89-1698

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL EWING,

Petitioner,

vs.

CITYTRUST,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 17, 47—August Term, 1989

(Argued September 21, 1989

Decided December 13, 1989)

Docket Nos. 89-7246, 89-7258

MICHAEL EWING,

Plaintiff-Appellant,
Cross-Appellee,

—v.—

ALVIN RUML and LYNDA EWING
as Executors of the Estate of Alexander Ewing,

Defendants-Appellees,

CITYTRUST,

Defendant-Appellee,
Cross-Appellant.

Before:

VAN GRAAFEILAND, MESKILL and KEARSE,
Circuit Judges.

Appeal from dismissal of claims alleging mishandling of two estates and two trusts and cross-appeal from an award of $81,769.58 for mishandling of a third trust. Dismissals affirmed. Award vacated and matter remanded for further consideration.

WILLIAM R. HORNER, New York, New York (Horner & Isaacs, P.C., New York, New York, of counsel), *for Plaintiff-Appellant-Cross-Appellee.*

DION W. MOORE, Bridgeport, Connecticut (Williams, Cooney & Sheehy, Bridgeport, Connecticut, of counsel) *for Defendant-Appellee-Cross-Appellant.*

VAN GRAAFEILAND, *Circuit Judge*:

On June 19, 1986, Michael Ewing ("Michael") brought the instant action against Citytrust alone in the United States District Court for the Southern District of New York, alleging that the Bank breached its fiduciary duty to him in the administration of two estates and three trusts. The estates in question were those of Michael's grandmother, Myra, and his grandfather, George. Citytrust and Michael's father, Alexander, were co-executors of both estates. The trusts in question were a testamentary trust created by Myra, of which Citytrust was the sole trustee, a testamentary trust created by George, of which Citytrust

was co-trustee with Alexander, and an inter vivos trust created by George, of which Citytrust was the sole trustee.

When Citytrust moved to join Alexander's Estate as an additional defendant, Alvin Ruml and Lynda Ewing, as Executors of the Estate of Alexander Ewing, were included as defendants pursuant to stipulation. The action thereafter was transferred to the United States District Court for the District of Connecticut. Michael now appeals from Chief Judge Daly's dismissal of Michael's claims involving Myra's estate and trust and George's inter vivos trust. Citytrust cross-appeals from an $81,769.58 judgment against it on Michael's claim involving the George Ewing testamentary trust. Although Michael's notice of appeal is general in scope, the relief he seeks is limited to his claim against Citytrust. Alvin Ruml and Lynda Ewing, as Executors of the Estate of Alexander Ewing, have not appeared in this appeal. The sole issue before us then is the conduct of the Bank.

Myra died on January 22, 1967. George died on June 3, 1967, leaving an only son, Alexander. Myra's trust named Alexander as the income beneficiary, with the remainder upon his death going to Alexander's issue [Michael] if he survived. Citytrust, as co-executor with Alexander and as sole trustee, was given the power "[t]o invest and reinvest without restriction or limitation" and to hold and retain stocks, bonds or other securities "whether or not the same shall be an investment of the character deemed to be legal and proper for Trust investments under the laws of the State of Connecticut." Myra's estate was made up largely of common stocks. Because they produced only modest income, the Bank sold them and invested the proceeds in tax-exempt bonds which produced substantially higher

income. The original trust corpus consisted of approximately $400,000 of these bonds.

George Ewing's inter vivos trust also consisted largely of common stocks. These stocks, having an approximate value of $1.5 million, were sold, and the proceeds invested mainly in bonds providing a higher rate of return. The income from this trust and so much of the principal "as may in the judgment of the Trustee be desirable to or for the benefit of [Alexander or Michael]" was to be paid to them "in such amounts and proportions as my said corporate Trustee in its sole and absolute discretion shall deem advisable from time to time without regard to equality of distribution." The Trustee also was empowered "to invest and reinvest in any property or security" and "to make, retain or change any investment without liability on account thereof."

George Ewing's will named Citytrust and Alexander as co-executors and as co-trustees of a trust, the corpus of which was approximately $283,497. However, Alexander delegated his responsibilities as co-trustee to Alvin Ruml, a New York City stockbroker, and Ruml thereafter offered his investment counsel and advice to Citytrust. The will empowered the corporate Trustee to pay so much of the net income to Alexander and Michael "in such amounts and proportions as my said corporate Trustee in its sole and absolute discretion shall deem advisable from time to time without regard to equality of distribution." It also authorized the corporate Trustee "to invade the principal for any reason in its discretion for the benefit of [Alexander or Michael]".

Michael argued in the district court that the defendants breached their fiduciary duties to him by (1) engaging in an investment policy favoring income production over

principal appreciation; (2) delegating investment strategy decisions to Alvin Ruml; and (3) distributing $111,000, the balance remaining in George's testamentary trust, to Alexander without Michael's knowledge or consent. Both sides moved for summary judgment. The district court granted summary judgment in favor of the defendants on the first two claims and in favor of Michael and against Citytrust on the third.

Before we can address the merits of the two appeals, we must determine whether the case comes to us in proper posture for review. The district court's disposition of the summary judgment motions is entitled "RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT." The decretal portion of this "RULING" provides that "partial summary judgment shall enter for the plaintiff only on the question of liability with regard to [the invasion of principal in the George Ewing testamentary trust]." With regard to Michael's remaining claims, the RULING provides that "partial summary judgment shall enter in favor of defendants Citytrust and the Estate of Alexander Ewing."

Citytrust moved for reconsideration of the portion of the district court's ruling that was in favor of Michael, and Michael moved for entry of final judgment and damages. On January 25, 1989, the district court denied Citytrust's motion for reconsideration and granted Michael's "application for damages . . . to the extent of $55,500 plus prejudgment interest . . . ." The order stated in conclusion that "upon the entry of final judgment, this matter is hereby closed of record." The judgment, entered on February 10, 1989, referred simply to the court's January 25th "Ruling" on plaintiff's motion for final judgment and then stated, it is "ORDERED and ADJU[D]GED that

judgment be and is hereby entered for the plaintiff in the amount of $81,769.58." This abbreviated judgment was signed and entered by the district court clerk.

Where a separate judgment thus is entered as required by Fed. R. Civ. P. 58, the preferred procedure is to make it self-sufficient and complete. 11 C. Wright and A. Miller, *Federal Practice and Procedure* § 2785 at 15-16. *Reytblatt v. Denton*, 812 F.2d 1042, 1043-44 (7th Cir. 1987). If this is done, it is readily apparent to all what relief has been granted and what has been denied and the date when this has occurred for purposes of appeal. *See Cardillo v. United States*, 767 F.2d 33 (2d Cir. 1985). However, where, as here, the appeals are timely and the district court's disposition of the case is undisputed, we may accept the appeal and interpret the judgment in the light of the district court's opinions, findings and conclusions of law. *See Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 295 (1943); *National Railroad Passenger Corp. v. City of New York*, 882 F.2d 710, 713 (2d Cir. 1989); *Security Mutual Casualty Co. v. Century Casualty Co.*, 621 F.2d 1062, 1066 (10th Cir. 1980). Any other disposition would result in a spinning of wheels for no practical purpose. *See Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385 (1978). Upon dismissal by this Court, the district court simply would enter a new judgment incorporating all the dispositive provisions of its summary judgment order, and review would be sought once again. *Id.* Accordingly, we treat the district court's disposition of the issues before it as a final dismissal of all claims made by Michael against the defendants, except that Michael was awarded judgment against Citytrust alone in the amount of $81,769.58 because of the distribution of principal to Alexander Ewing from the George Ewing testamentary trust. We affirm the district court's dismissal of the several

claims that it found to be without basis. We vacate the $81,769.58 award against Citytrust and remand for further proceedings with respect to this claim.

THE DISMISSED CLAIMS

In dismissing Michael Ewing's claims based on alleged improper investment policies, the district court correctly noted that the issue of the defendants' breach of fiduciary duty was a matter of state law. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Where, as here, the interpretation of state law is made by a district judge sitting in that state, it is entitled to great weight and should not be reversed unless it is clearly wrong. *Lomartira v. American Automobile Ins. Co.*, 371 F.2d 550, 554 (2d Cir. 1967). Michael has not convinced this Court that the district court's reasoning is so flawed as to fail under this standard. Quite to the contrary, the lower court's decision on this issue is well reasoned and correct.

Both in its capacity as executor and trustee, Citytrust owed Michael a fiduciary obligation. *See Satti v. Rago*, 186 Conn. 360, 367 (1982); *O'Connor v. Chiascione*, 130 Conn. 304, 307-08 (1943); 45 Conn. Gen. Stat. Ann. § 45-100d(a) (West Supp. 1989). Connecticut law generally requires that a fiduciary such as Citytrust act with the care of a prudent investor in managing estate assets. *United States Trust Co. v. Bohart*, 197 Conn. 34, 48 (1985); *see also Jackson v. Conland*, 178 Conn. 52, 55 & n.3 (1979); Conn. Gen. Stat. Ann. § 45-88 (West Supp. 1989). Language in a will or trust agreement, however, may excuse such a fiduciary from the strictures of this rule and allow it a broader range of investment discretion than the rule otherwise would permit. *United States Trust Co. v. Bohart*, *supra*, 197 Conn. at 48; *see also Jackson v. Con-*

land, *supra*, 178 Conn. at 55 & n.3 (1979); *Reed v. Reed*, 80 Conn. 401, 409-10 (1908); Conn. Gen. Stat. Ann. § 45-88 (West Supp. 1989). In such circumstances, courts may hold the fiduciary liable only where it abuses that discretion. *United States Trust Co. v. Bohart*, *supra*, 197 Conn. at 48. Courts will not find such abuse unless the fiduciary has acted dishonestly or with improper motive, has failed "to use his judgment," or has "acted beyond the bounds of a reasonable judgment." *Restatement (Second) of Trusts* § 187, comment e (1959); *see also Gimbel v. Bernard F. & Alva B. Gimbel Foundation, Inc.*, 166 Conn. 21, 37 (1974).

Michael has not shown that Citytrust abused its discretion under any of these criteria. Although Michael argues that Citytrust should have followed a different investment strategy to better serve his interests as the remainderman of various trust assets, the district court correctly held that George's will did not require it to do so. Moreover, Michael has made no showing that Citytrust acted dishonestly, in bad faith, with improper motives, or in a grossly negligent manner in following a conservative investment policy emphasizing income over capital gains. We accordingly find, as did the court below, that Citytrust did not abuse its discretion in following the investment strategy of which Michael now complains.

The district court correctly rejected Michael's argument that Citytrust breached its fiduciary duty by delegating to Alvin Ruml its authority to control the investment policy of the Ewing trusts. The court found that, although Ruml and Citytrust had a relationship and a variety of contacts, their interaction did not indicate a delegation of trust responsibilities. Michael does not seriously dispute that finding in this Court, and we see nothing in the record that

warrants a contrary conclusion. Citytrust, as trustee, was entitled to consult advisors in making investment decisions. *See Restatement (Second) of Trusts* § 171 comment f (1959); *McClure v. Middletown Trust Co.*, 95 Conn. 148, 153-54 (1920). Its dealings with Ruml were nothing more than such consultation.

THE MONETARY AWARD

As above stated, the George Ewing testamentary trust authorized Citytrust as trustee "to invade the principal for any reason in its discretion for the benefit of [Alexander] or [Michael]." The district court construed this clause to mean that principal could be invaded only for the personal needs of Alexander and Michael:

> The primary intent of the settlor in this instance appears to have been to provide the two income beneficiaries with a fund upon which they could draw income and invade principal as the need arose.

Proceeding from this premise, the district court held that payment of principal to Alexander was improper where Alexander's admitted intent was to use the money to help him provide support for his stepchildren. This interpretation of the trust provisions gave to the word "benefit" a meaning that is contrary to the overwhelming weight of legal authority.

In *Ferrigino v. Keasbey*, 93 Conn. 445 (1919), the Connecticut Supreme Court, contrasting the words "support" and "benefit", as used in Conn. Gen. Stat. § 5275, now in substance section 46b-37, said, quoting Webster's *New International Dictionary*, that "the word 'benefit' is

defined to be 'whatever promotes prosperity and personal happiness; advantage; profit; good.' " *Id.* at 451.

This definition accords with that given the word "benefit" in most other states; *i.e.*, that it is more comprehensive than the word "support" and means anything that works to the advantage, gain or happiness of the recipient. *See, e.g.*, *In re Emmons Will*, 165 Misc. 192, 195 (1937); *In re Rachlin's Will*, 133 N.Y.S.2d 151 (1954); *Matter of Estate of Hixon*, 715 P.2d 1087, 1090 (Okla. 1985); *Matter of Conrad*, 97 Ill. App. 3d 202, 203 (1981); *Bird v. Newcomb*, 170 Va. 208, 216 (1938); *Matter of Estate of Krause*, 173 Wash. 1, 7-8 (1933); *Winthrop Co. v. Clinton*, 196 Pa. 472, 474 (1900). See also *Black's Law Dictionary* 200 (4th ed. 1968).

Indeed the word "benefit" is sufficiently broad that a bequest of all the property of a testator to his wife "for her own proper use and benefit, forever" has been construed to convey an estate in fee simple absolute. *Dei Cas v. Mayfield*, 199 Conn. 569, 573 (1986). "A gift to a person for his benefit means an absolute gift, and excludes the idea of a qualified or limited estate." *Crain v. Wright*, 114 N.Y. 307, 310 (1889). *See also Warren v. Webb*, 68 Me. 133, 135 (1878); *Stowell v. Hastings*, 59 Vt. 494, 497 (1887).

The word "benefit" has received a good deal of attention in tax litigation, where the extent of the power to invade principal on behalf of a trust beneficiary may determine who pays an estate tax. A power to invade principal that is limited by an ascertainable or measurable standard, *i.e.*, for support, maintenance, health, etc., is held not to be a general power of appointment for tax purposes. *See Henslee v. Union Planters National Bank & Trust Co.*, 335 U.S. 595, 597-600 (1949); 26 U.S.C.

§ 2041(b)(1)(A). The cases uniformly hold, however, that a power to invade principal for the "benefit" of a trust beneficiary does not limit the beneficiary's power of invasion. *See De Oliveira v. United States*, 767 F.2d 1344, 1348 (9th Cir. 1985); *Old Colony Trust Co. v. United States*, 423 F.2d 601, 604 (1st Cir. 1970); *National Bank of Commerce v. United States*, 369 F. Supp. 990, 992 (W.D. Tex. 1973), *aff'd*, 491 F.2d 1271 (5th Cir. 1974); *Newton Trust Co. v. Comm'r*, 160 F.2d 175, 179 (1st Cir. 1947); *Helvering v. Evans*, 126 F.2d 270, 272 (3d Cir.), *cert. denied*, 317 U.S. 638 (1942). The following language from *National Bank*, *supra*, 369 F. Supp. at 992, is illustrative:

> Considering plaintiff's contentions in order, the Court begins the search for an ascertainable standard with the trust instrument. It provides only one express standard, i.e. "benefit [of decedent's wife]." This standard "is so loose that the trustee is in effect uncontrolled."

(Quoting *Old Colony Trust Co.*, *supra*, 423 F.2d at 604).

Alexander Ewing was spending about $5,000 per month to support his stepchildren, who were remaindermen under the George Ewing testamentary trust. Alexander requested that the $111,000 be withdrawn for him because it would take care of two years of these "expenses". The Bank determined that it would be to Alexander's benefit to take the money for this purpose out of the testamentary trust rather than the inter vivos one, because it would give Alexander about a $51,000 tax loss which he could use on liquidation. We hold that, under the foregoing circumstances, the challenged withdrawal was for Alexander's benefit. The issue of Alexander's "need" for the money therefore was irrelevant. Indeed, because Alexander was a multi-millionaire, having inherited more than $2 million

from his parents alone, a limitation of trust payments to him based solely on need hardly could have been within the contemplation of his parents when they adopted the trust language permitting withdrawals for his "benefit".

The $81,769.58 award is vacated, and the issue of liability on this claim is remanded to the district court for further consideration. Since the several "irregularities" that the district court found to support this award were premised upon its erroneous legal finding of unlawfulness, we believe that the district court should go back to square one with regard to these alleged irregularities and reconsider them on a full record interpreted in the light of proper legal principles. In other words, before determining whether Citytrust is liable on this claim, the district court should permit a full development of all the pertinent facts.

CONCLUSION

The district court's dismissal of all of Michael Ewing's claims against Citytrust except that of invasion of principal in the George Ewing testamentary trust is affirmed. The award of $81,769.58 against Citytrust in connection with the invasion of principal in the George Ewing testamentary trust is vacated, and this issue is remanded to the district court for further proceedings consistent with this opinion.

United States District Court
District of Connecticut

MICHAEL EWING,

Plaintiff,

-v.-

CITYTRUST, ET AL

Defendants.

CIVIL NO. B-87-314 (TFGD)

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Pending before the Court are plaintiff Michael Ewing's and defendant Citytrust's cross-motions for summary judgment. Both parties have submitted statements of material facts and memoranda in support of pre-trial disposition of this matter. Defendant Estate of Alexander Ewing, through its executors, has joined in

Citytrust's motion for summary judgment and its opposition to Michael Ewing's request for the same. None of the parties has complied with Local Rule 9(c)(2)'s requirement that "[t]he papers opposing a motion for summary judgment shall include a separate, short and concise statement of material facts as to which it is contended that there exists a genuine issue to be tried." However, because it finds no dispute of material fact, the Court will rule on these motions.

BACKGROUND

Plaintiff is the only son of Alexander Ewing. Alexander died on October, 1984, and was the only son of Myra and George Ewing.

Myra Ewing died on January 22, 1967, and in her will bequeathed to plaintiff ten

thousand dollars, and to Alexander Ewing one-half of her residuary estate. The remaining one-half of her residuary estate became the principal of a testamentary trust ("Myra Ewing's Testamentary Trust"). The net income of this trust was to go to Alexander. The principal, upon Alexander's death, was to go to Alexander's lawful issue, namely the plaintiff, Michael Ewing.

Defendant Citytrust, together with Alexander Ewing, was named co-executor of Myra Ewing's estate. Defendant Citytrust was also named sole trustee of Myra's trust. The will conferred a variety of discretionary powers on the executors and trustee, including the power to "hold and retain" shares of stocks, bonds, or other securities and the power to "invest and

reinvest without restriction or limitation."

Soon after Myra's death, her estate's executors sold all the stocks of which she died seized, and purchased municipal bonds. Myra Ewing's Testamentary Trust, consequently, was funded by bonds with a market value of $388,188.00. Fifteen years later, upon the death of Alexander and the termination of this trust, the principal had a market value of $462,000.00.[1] Defendant Citytrust administered Myra's Trust to maximize income by keeping the funds invested in tax-exempt bonds which appreciated by only 19% from the trust's

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[1] In a non-material dispute of fact, plaintiff's complaint alleges that the value of the principal of the trust upon termination was $471,259.16.

inception in 1970 to its distribution to plaintiff in 1985, amounting to a gain of 1.2% per year.

George Ewing died on June 3, 1967. In his will, George Ewing bequeathed ten thousand dollars to plaintiff, and one-half of his residuary estate to Alexander Ewing. Thus, Alexander inherited outright from his parents' estates approximately $2,169,198.00 (including the gift of IBM and Singer stock worth $1,486,997.75 that George made to Alexander shortly before his death). The remaining one-half of George Ewing's residuary estate was placed in a testamentary trust (the "George Ewing "Testamentary Trust"). The net income of this trust was to go to Alexander and his lawful issue, "in such amounts and proportions as my said corporate Trustee in its sole and absolute discretion shall

deem advisable from time to time without regard to equality of distribution."

Both Alexander and Citytrust were named as executors and trustees of George's Testamentary Trust, which at its creation had a market value of $283,492.00. Among the enumerated powers granted them in George Ewing's will were the power to hold and retain stocks and other holdings, and the power to invest and reinvest without restriction or limitation. Additionally, Citytrust was empowered to invade the principal "for any reason" for the benefit of Alexander or his lawful issue.

Shortly after George's death, his estate's executors liquidated his stock holdings and purchased municipal bonds. The parties agree that the George Ewing Testamentary Trust operated primarily as an income producer for Alexander, as

opposed to a source of capital expansion. In light of this fact, the trust principal was also invaded for the benefit of both Alexander and Michael Ewing, in the approximate amounts of $40,000.00 and $60,000.00 respectively.

In February 1984, at the request of Alexander, Citytrust invaded the trust for the purpose of enabling Alexander to continue supporting the four children of his third wife, Lynda, from her previous marriage, who were at the time 32, 34, 36, and 38 years old, respectively, thus terminating the trust. No portion of this remaining $111,000 in trust was distributed to the plaintiff despite his status as income and principal beneficiary.

The authorization for this invasion was not approved by two bank officers as

required by Citytrust's own policy guidelines. Furthermore, in applying to the Probate Court for the District of Norwalk for permission to distribute all of the remaining principal to Alexander, Citytrust failed to advise the court that the Testamentary Trust was also for the benefit of Michael Ewing.

In the administration of the George Ewing Testamentary Trust, Citytrust permitted Alexander Ewing to delegate his authority as trustee to Mr. Alvin Ruml, a stockbroker affiliated with Hallgarten & Co. in New York City. Mr. Ruml acted as an investment adviser on the Ewing trusts and was in contact with Mr. Kenneth Park, a trust officer with Citytrust, as early as December 12, 1967 in this regard. This was done without the knowledge or consent of the plaintiff.

George Ewing also created an inter vivos trust on May 2, 1967 (the "George Ewing Inter Vivos Trust"), funded solely by shares of Singer and IBM stock. The trust, which had a market value of $1,487,715.00 named both Alexander Ewing and plaintiff as income beneficiaries and defendant Citytrust as sole trustee.

This trust empowered Citytrust to invest and reinvest, and to invade the principal for the benefit of either or both Alexander or Michael Ewing without regard to equality of distribution. Plaintiff was named remainderman of one-half of the remaining principal upon the death of Alexander Ewing. This trust was administered at all times to maximize income without regard to preservation of the buying power of the corpus of the trust. Yet, all requests made by plaintiff for additional allowance, or monies, from

defendant during his father's lifetime were acceded to and were sufficient to meet his living expenses and other needs. Plaintiff has agreed that his father's income needs were far greater than his own and that his father had a greater interest in the income distribution. Furthermore, the plaintiff is not contesting the income allocations from either of the George Ewing Trusts between plaintiff and his father or the invasions of principal for his father under the George Ewing Inter Vivos Trust. Investments in the trust were made in tax-exempt and corporate bonds to provide an income in the range of $100,000.00. In 1973, yearly income was in the amount of $38,592.00. By 1982, as Citytrust strove to diversify the high concentration of Singer and IBM stock in this trust by selling stock and purchasing bonds, income had been increased to

approximately $120,000.00. Having concluded there are no disputed material facts,[2] the Court will determine whether the plaintiff or defendants are entitled to summary judgment as a matter of law.

QUESTIONS PRESENTED

In the pending cross-motions for summary judgment, the questions at issue concern whether the defendants, in their respective capacities as executors and trustees described above, breached their fiduciary duties to Michael Ewing, a beneficiary, by: 1) engaging in an

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[2] There is a non-material factual dispute as to when Michael Ewing began receiving information on the three trusts at issue which the Court need not address.

investment policy favoring income production over capital appreciation; 2) delegating to an individual who was not an employee of the trustee a role in the investment strategy of the trusts at issue; and 3) invading and terminating, for the exclusive benefit of one beneficiary without notice to or consent of another beneficiary, a testamentary trust set up for their mutual benefit. Neither plaintiff nor defendants put forth any argument concerning the "THIRD CLAIM" of the complaint relating to an alleged improper distribution of principal from Myra Ewing's Testamentary Trust. Nor do they address the issue of what damages, if any, should enter as a result of the Court's ruling. For these reasons, the Court treats these motions as only motions for partial summary judgment and reserves

the right to require additional briefing on damages if such is required.

DECISION

To prevail on a summary judgment motion, the movant must show 'that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Any and all ambiguities and inferences arising out of or to be drawn from the undisputed facts must be resolved against the moving party. American Int'l Group, Inc. v. London Am. Int'l Corp., 664 F.2d 348, 351 (2d Cir. 1981). The moving party bears the burden of production as well as the burden of persuasion with respect to establishing the non-existence of a "genuine issue" of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When there are cross-motions

before a court, this burden remains the same and each motion is to be judged on its own merits. Schwabenbauer v. Board of Education, 667 F.2d 305, 314 (2d cir. 1981); Knowles v. Postmaster General, 656 F. Supp. 593, 597 (D. Conn. 1987).

A) THE INVESTMENT IN BONDS

In this diversity action, the question of whether the defendants breached their fiduciary duties to the plaintiff is a matter of state law. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) In Connecticut, when a trustee is granted discretionary powers with respect to a trust, a court will not attempt to control such discretion unless it is abused.[3]

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[3] Plaintiff argues that the court should review defendants' actions in light of the prudent investor rule. It provides that a

(Footnote continued)

Gimbel v. Bernard F. & Alva B. Gimbel Foundation, Inc., 166 Conn. 21, 36, 347 A.2d 81 (1974).

Plaintiff's contentions notwithstanding, the defendants' actions must be judged in accordance with the abuse of discretion standard. The language of the various trusts dictate this result. Myra Ewing's

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trustee is under a duty to act with the care of a prudent investor (i.e., to exercise the skill and care in administering a trust normally shown by a person of ordinary prudence in managing his own property, Restatement (Second) Trusts § 174). By virtue of the grants of discretion in the trust instruments at issue, the prudent investor rule does not apply and defendants need only have acted in accordance with and not abused the discretion granted them to avoid liability. See United States Trust Co. v. Bohart, 197 Conn. 34, 48, 495 A.2d 1034 (1985); Jackson v. Conlard, 178 Conn. 52, 55-57, 420 A.2d 898 (1979).

Testamentary Trust gives its trustee and executors, inter alia, the discretionary power to invest and reinvest without restriction or limitation and to hold and retain in the trust any stocks or bonds of "which [the] estate or any part thereof may be invested at the time of [the settlor's] death, whether or not the same shall be an investment of the character deemed to be legal and proper for the Trust Instruments under [Connecticut law]." George Ewing's Testamentary Trust contained a similar grant of discretionary powers to its trustees and executors. George Ewing's Inter Vivos Trust granted the trustee, Citytrust, the power to "hold, manage, invest and reinvest said fund and pay the income therefrom and so much of the principal as may in the judgment of the Trustee be desirable . . . in such amounts and proportions [as it

deems advisable in its sole and absolute discretion] without regard to equality of distribution." Furthermore, it granted Citytrust the discretionary power "[t]o invest and reinvest in property or security which it shall select" and "to make, retain or change any investment without liability on account thereof." These broad grants of discretionary power are in material respects similar to those granted in Bohart and Gimbel. Therefore, the Court will apply the abuse of discretion standard discussed therein.

The question of whether the defendants abused their discretion in adopting an investment strategy favoring the interest of the income beneficiary depends upon the language of and the Court's interpretation of the pertinent trusts. In examining these trusts, "[t]he expressed intent must control, although this is to be determined

from reading the instrument as a whole in light of the circumstances surrounding the testator or settlor when the instrument was executed, including the condition of his estate, his relations to his family and the beneficiaries, and their situation and condition." Connecticut Bank & Trust Co. v. Lyman, 148 Conn. 273, 278-79 170 A.2d 130 (1961). Though a court should put itself as far as possible in the shoes of the settlor in an effort to give effect to his or her intentions, it should not speculate as to the same.[4] Id.

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[4] Furthermore, when the meaning of a term or word in a will is unambiguous and unequivocal, a court will not allow parol evidence to be offered which purports to supplement or change the expressed intention of the will. Travelers Bank & Trust Co. v. Birge, 136 Conn. 21, 26-27, 68 A.2d 138 (1949). For this reason, the Court will not consider the recollections of Mr. McKendry, scrivener of the three

(Footnote continued)

The plaintiff makes two arguments that the defendants in their roles as executors and trustees abused their discretion by adopting an investment policy geared more toward generating income than effecting capital appreciation. The plaintiff first attacks the executors of the Estates of Myra & George Ewing - defendants Citytrust and Alexander Ewing's Estate - for selling equity issues and purchasing corporate and municipal bonds with the proceeds. Specifically, in the case of Myra Ewing's Estate, two months after her death her stock holdings of General Electric, Eastman Kodak Co, IBM, Singer, Standard Oil, etc., were sold and the proceeds were

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trusts at issue, as to the intent of George and Myra Ewing in the creation of these trusts.

invested in a portfolio of municipal bonds. Nine months later in December 1967, these same executors sold these municipal bonds at a loss of $103,577.00 and the proceeds were again used to purchase municipal bonds. Similarly, after George Ewing's death, his executors sold his blue-chip stock holdings and purchased a portfolio of corporate and municipal bonds. These actions, Michael Ewing argues, were not in accord with the intentions stated in George and Myra's wills and therefore constituted an abuse of discretion.

The Court disagrees. Myra Ewing's will clearly empowers defendants to "invest and reinvest without restriction or limitation." Nowhere does it indicate that the testamentary provision authorizing defendants to "hold and

retain" stocks of which Myra Ewing died seized, overrides or otherwise limits or controls the discretionary power cited above. Also, it is not at all clear from the will that Myra Ewing intended that her stocks be retained if in the judgment of her executors it was wiser to invest in bonds. The same is true with respect to George Ewing's (Will and) Testamentary Trust, the funds of which were similarly converted from stocks into bonds. Quite frankly, the Court is not persuaded that the language of Myra's (Will and) Testamentary Trust, including that provision that directed the net income of the trust to be paid to Alexander "for and during the term of his natural life," must be authoritatively read to favor either the life tenant or the remainderman. However, to the extent that there are no restrictions or limitations on the income

to be paid to Alexander, the Court is not prepared to override the judgment of Myra's executors to provide for such income by the sale of stocks and the purchase of bonds. See Bohart, 197 Conn. at 49 (mere errors of judgment are not a basis for liability). As a practical matter, it may have been more efficient to use Myra's trust as the main income producing source for Alexander Ewing since this trust was the only one of the three to name Alexander as the sole income beneficiary.

The designation, in George Ewing's Testamentary Trust, of Alexander and Michael Ewing as co-income beneficiaries also supports the decision to sell George's stock portfolio and exchange it for a bond portfolio that would support, if necessary, two income beneficiaries who

were also granted principal invasion powers. For all these reasons, the Court holds that the executors' actions in liquidating the stock holdings of Myra and George Ewing's Estates and exchanging them for bond holdings, were not an abuse of discretion.

The second half of the plaintiff's argument relates to the investment policy of the same defendants as trustees subsequent to the time that these trusts came into being. Citytrust was a trustee of all three trusts. Alexander Ewing was a co-trustee in the administration of the George Ewing Testamentary Trust. The defendants argue that investing to maximize income return, as opposed to long-term corpus value, was within the trustees' discretion because the trust instruments indicated an intent to favor

the life tenant by virtue of the designation of the same and the power of invasion authorized in two of the three trusts. The plaintiff rejects this contention and argues that the trust instruments at issue do not indicate a preference for either the income or principal beneficiaries and therefore the defendants' admitted attempts to maximize income constitute an abuse of discretion. The plaintiff carries this argument so far that it reads the George Ewing Inter Vivos Trust as providing only for the extraordinary and unforeseeable needs Alexander and Michael might face during Alexander Ewing's life; absent such needs plaintiff claims the essential intent of the settlor in that instrument was to provide Michael with substantial sums of money. The Court refuses to adopt either of these views.

Outside of the liberal discretionary powers set out above, the language of Myra's Testamentary Trust indicates neither a preference to favor the income beneficiary nor the principal beneficiary. The fact that there is no language authorizing an invasion of the corpus for the benefit of the plaintiff or his father indicates an intent to create some rough equivalency between their competing interests. Furthermore, any intent to favor the plaintiff is negated by the fact that there was no restriction on the purposes for which the income was to be paid to Alexander Ewing.

As previously described, George Ewing's Testamentary Trust contained liberal discretionary powers on the choice of investment to be made by the trustees. It also empowered the corporate trustee,

Citybank, in the exercise of its sole and absolute discretion, to pay the net income of the trust to Alexander and Michael Ewing in any amount it deemed advisable, "without regard to equality of distribution." Furthermore, Citytrust was authorized to use its discretion to invade the principal for the benefit of Alexander or Michael Ewing at any time and for any reason. Upon the death of George Ewing, one-half of the remainder of the trust corpus was to go to the plaintiff and one-half was to go in trust with Lynda Ewing, Alexander's third wife, receiving the income during her life with the remainder being distributed to her four children from a previous marriage.

Insofar as this instrument names two income beneficiaries and authorizes invasion of the principal by either of the

income beneficiaries essentially without restriction, the Court holds that it was not the primary intent of the settlor to ensure the substantial appreciation of the trust corpus for the remaindermen. The primary intent of the settlor in this instance appear to have been to provide the two income beneficiaries with a fund upon which they could draw income and invade principal as the need arose.

The same reasoning and interpretation given to George Ewing's Testamentary Trust, also applies to George's Inter Vivos Trust. It named Alexander and Michael as co-income beneficiaries and empowered Citytrust to invade the principal for both of them without regard to equality of distribution. Like Myra's trust, it failed to state any restrictions or limitation on the payment of income.

Finally, George's Inter Vivos Trust empowered Citytrust "to make, retain or change any investment without liability on account thereof." For these reasons, the Court holds that it was not the primary intent of this trust to ensure the substantial appreciation of the trust corpus, but rather to provide the co-income beneficiaries with a fund upon which they could draw income and invade principal as the need arose.

A trustee has abused his discretion when he has failed to perform his duties or acted dishonestly or in bad faith or acted from an improper motive. See Gimbel, 166 Conn. at 36-37; Restatement (Second) Trusts ("Restatement") § 187, comments e, f (1959). Under normal circumstances, in the course of performing his duties, a trustee must strive to act with

impartiality as to successive beneficiaries; he has no power to alter their respective beneficial interests. Gimbel at 34; Restatement § 183 (1959). Where there are successive beneficiaries, a trustee must balance their interests such that, on the one hand, he must not retain unproductive property likely to yield an income far below that which is normally earned by a like instrument, and on the other hand, he must not purchase or retain assets or property likely to waste or depreciate in value. Restatement §232, comment b (1959). However, while a trustee must always act with "due regard" for each beneficiary's interest, where he is given the authority to favor one beneficiary over another, a court must not interfere except to prevent abuses of discretion. Id. at §183, comment a, §232. Ultimately, it must be remembered that

> [a] trustee is neither the insurer nor the guarantor of the value of a trust's assets. A trustee's performance is not judged by success or failure, and while negligence may result in liability, a mere error in judgment will not.

Bohart, 197 Conn. at 149 (citing Hartford Nat'l Bank & Trust Co. v. Donahue, 35 Conn. Supp. 194, 402 A.2d 1195 (1972)).

Based on a reading of the three trust instruments, the Court holds that the trustees-defendants did not abuse their discretion in the performance of their duties. The Court is not prepared to hold that the defendants' investment strategy was undertaken in bad faith or from improper motives or was in dereliction of their duties or substantially or materially altered the beneficiaries' interests as set out in the trust instruments.

Based on the Court's holding that it was not the primary intent of the two George Ewing Trusts to ensure the substantial appreciation of the corpus for the remaindermen and the fact that these trusts granted the trustees liberal investment powers, the defendants had the discretion to favor the interests of the income beneficiaries--one of whom was in fact the plaintiff. As an income beneficiary of the George Ewing Testamentary Trust, Michael Ewing received a $66,000.00 distribution of income and principal in September 1968. Furthermore, the principal of the same trust was invaded for his benefit on other occasions and without objection in the amount of at least $60,000.00. Likewise the principal of the George Ewing Inter Vivos Trust was invaded for Michael's benefit without objection, in the amount of $15,000.00 in

1982 for his medical expenses, and in the amount of $24,000.00 respectively in both 1983 and 1984 for his living expenses.

There is no doubt that Alexander drew a substantial income as a result of the defendants' investment policies. However, in light of the income and principal distributions for the benefit of the plaintiff noted above, the Court is unwilling to hold that the defendants' investment strategy constituted an abuse of discretion.

Moreover, the fact remains that Myra's trust appreciated in value from $388,188.00 to $462,000.00 over the course of fifteen years. Though small and perhaps in real dollar terms negligible or non-existent, this appreciation indicates, at a minimum, preservation as opposed to destruction of the corpus for the

plaintiff's benefit. Despite defendants' strategy to provide income for Alexander, the corpus of the Ewing Trusts after Alexander's death was approximately $1,900,000.00 ($462,000.00 remaining from Myra's trust and $1,442,000.00 from George Ewing's Inter Vivos Trust). That plaintiff was entitled to receive approximately $1,200,000.00 when his father died also indicates preservation and not destruction of the principal.

Michael Ewing appears to be arguing that he would have received more money had the trust been managed more favorably to the remainderman. This argument is similar to that made in Kimbal v. New England Telephone Co., 14 Conn. Supp. 432 (1977). In Kimball, the court refused to upset the trustee's attempt to diversify the trust holdings to meet the perceived intentions

of the settlor in providing for the life tenant and remaindermen simply because the remaindermen were unhappy about the new investments made by the trustee. Id. at 441. The Kimball court made this ruling despite the fact that the trustee, who was granted a wide berth of discretion, sold blue-chip stocks at a low market price. Id. Because a trustee is neither the insurer nor guarantor of the value of trust assets and because a mere error in judgment will not result in liability, Bohart, 197 Conn. at 49, the Court refuses to hold that the trustees' investment strategy constituted an abuse of discretion.

B) THE DELEGATION OF INVESTMENT CONTROL TO ALVIN RUML

Plaintiff also argues that Citytrust, alone, breached its fiduciary duty by delegating to Alvin Ruml the authority to dictate the investment policy of the Ewing trusts. The Court rejects this argument for the reasons set forth below.

A trustee is under a duty not to delegate acts which it can and reasonably should be required to perform. Restatement § 171 (1959). If such a delegation takes place, it may constitute an abuse of discretion. See Kolodney v. Kolodney, 6 Conn. App. 118, 122-23, 503 A.2d 625 (1986) (abuse of discretion to delegate duty to exercise independent judgment as to a beneficiary's needs). In particular, a trustee cannot delegate the power to select investments. Restatement § 171 comment h (1959). These proscriptions,

however, should not be read to mean that a trustee may not consult with others in the process of administering a trust. Id. at comment f (1959).

> While the trustee may not delegate his duties and powers to others, it is obvious that he must act frequently through agents or attorneys. This is not a delegation of his powers, for the trustee remains responsible for the reasonable diligence of his agent or attorney. . . . Whether, in a given case, the trustee will be justified in entrusting a specific part of the administration of the trust to an agent, must depend upon whether such act would be the act of the reasonably prudent trustee in a similar situation.

McClure v. Middletown Trust Co., 95 Conn. 148, 153-54, 110 A.2d 838 (1920).

The plaintiff's argument that Citytrust abused its discretion in delegating investment powers to Alvin Ruml is misdirected. On June 18, 1970, Alexander Ewing notified Citytrust that he had delegated his authority as co-trustee of the George Ewing Testamentary Trust to Alvin Ruml and noted that his letter "[would] be [Citytrust's] authority to require [Ruml's approval] in connection with any investment changes [therein]". Insofar as plaintiff's argument relies on this delegation, it is ill-founded because Alexander Ewing, and not Citytrust, delegated his duties.

The record does indicate, however, a longstanding relationship between Ruml and Citytrust. From at least December 12, 1967, through January 31, 1984, Citytrust consulted with Ruml regarding its

investment policy on each of the three Ewing trusts. For example, the plaintiff has submitted three letters dated December 12, 1967, April 23, 1968, and October 20, 1970, wherein Citytrust asked Ruml to approve its recommendations as to investment decisions in the two George Ewing trusts. Alexander Ewing was carbon-copied on each of these letters. In light of Alexander's formal delegation discussed above, the Court reads these letters to imply that Ruml, both formally and informally, acted as a conduit between Citytrust and Alexander Ewing.

Citytrust's investment reviews for the period of 1967 to 1984 indicate that Ruml also acted as an investment adviser and broker on all three of the Ewing trusts. They indicate that the buy and sell orders flowing from Citytrust's investment

decisions were processed through the brokerage firm where Mr. Ruml worked, namely First Manhattan Corporation. In this context, it is clear that Ruml: 1) commented on and approved investment recommendations made by Citytrust both in the role of investment adviser and as the "representative" of Alexander Ewing; 2) communicated to Citytrust regarding Alexander's income needs: 3) offered unsolicited investment advice; and 4) generally acted as an all-purpose investment broker.

This course of dealings does not indicate that Citytrust delegated its investment responsibilities to Ruml, as did Alexander Ewing. It has not been shown in any of these investment decisions that Ruml exercised any kind of ultimate, controlling authority as to which

investments were actually made. In fact, the record shows that in those instances where Ruml was consulted, he acted on the investment recommendation made by Citytrust. For these reasons, the Court holds that Citytrust did delegate its investment authority to Alvin Ruml and did not abuse its discretion in consulting with him in its investment decisions.

C) THE INVASION OF GEORGE EWING'S TESTAMENTARY TRUST

Plaintiff further claims that Citytrust abused its discretion when it invaded the principal of George Ewing's Testamentary Trust in 1984 for the purpose of supporting his step-children, the issue of Lynda Ewing, Alexander's third wife. George Ewing's will authorizes Citytrust "to invade the principal for any reason in

its discretion for the benefit of [Alexander] or [Michael]."[5]

Although the instrument's express language does not name Lynda Ewing or her children as beneficiaries of such an invasion, the intent of the instrument must be determined from reading the instrument as a whole in light of all relevant circumstances Lyman, 148 Conn. at 278. The Ewing step-children are remaindermen following Lynda Ewing's vested remainder in a life tenancy, consisting of one-half of the remainder of George Ewing's Testamentary Trust,

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[5] Plaintiff does not raise and therefore the Court does not consider whether Alexander Ewing's Estate should be held liable for this invasion.

commencing upon the termination of Alexander's life tenancy. The other one-half would go to Michael.

Conceivably, Alexander may have wanted to provide support for his step-children, who at the time of the invasion were all in their thirties. Plaintiff urges the Court to speculate as to why seven months before his death, Alexander desired to insure that the $111,000.00 that remained in trust skip a step in the testamentary scheme, thus avoiding the principal distribution to Michael, and why it was necessary for Alexander to support four adults. However, the Court's task is not to speculate, but rather to determine the intent of the testator.

Even though the power of invasion is liberally granted, the Court is compelled, in light of the facts surrounding the

authorization of said invasion and hence the termination of the trust, to give effect to the will's express limitation that said invasion be restricted "for the benefit of [Alexander] or [Michael]." For where such limitations on invasion powers are expressed, "they should be enforced to prevent an untrammelled invasion of principal." Id.

The Court finds that Citytrust abused its discretion in authorizing this invasion for the monthly support of Lynda Ewing's children for the following reasons. First, George Ewing's will clearly makes other provision for the step-children. Second, there were a number of irregularities surrounding this invasion of George Ewing's Testatmentary Trust which cast a substantial shadow of doubt on Citytrust's good faith, or at the

least call into question its performance of its duties as trustee.

Initially, the authorization for invasion form which stated why Alexander sought to invade, failed to indicate that plaintiff was an income beneficiary as well as a remainderman in the portion of the form discussing statements of possible conflict. Furthermore, Citytrust failed to abide by its own Investment Policy guidelines requiring two signatures of approval for discretionary invasions of principal by two trust administrative officers, each of whom must be familiar with appropriate provisions of the trust instrument. In two other invasions of principal brought to the Court's attention, the required two signatures are present. Yet in the invasion by Alexander

Ewing for the benefit of his step-children only one signature was given.

Furthermore, Citytrust's actions in submitting a Final Accounting of this trust raise an inference that Citytrust recognized that it had abused its discretion. In the Final Accounting of George Ewing's Testamentary Trust submitted to the Probate Court for the District of Norwalk on April 16, 1984, defendant Citytrust and Alexander Ewing stated that the trust was "FOR THE BENEFIT OF ALEXANDER EWING," not once informing the Probate Court of the plaintiff's name or interest as income and principal beneficiary. This omission failed to advise the Probate Court of all adverse parties to the accounting pursuant to Conn. Gen. Stat. § 45-270, thus denying plaintiff notice, and placing the validity of the accounting in jeopardy. See State

v. Thresher, 77 Conn. 70, 80-2, 58 A. 460 (1904). While any of the above-described omissions alone may have not have raised the same questions of bad faith or dereliction of duty, when taken together and examined in conjunction with the clear language of the George Ewing Testamentary Trust and the negative inference raised by the inadequate disclosure made to the Probate Court in the Final Accounting, they indicate that Citytrust abused its discretion in allowing Alexander Ewing to invade the remaining principal of $111,000.00 thus terminating the George Ewing Testamentary Trust.[6]

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[6] The Court rejects Citytrust's argument that Michael Ewing explicitly or implicitly consented to the trustee's acts and is thereby barred from recovery, see Matthews v. Sheehan, 76 Conn. 654, 662, 57 A. 694 (1904), because at least with

(Footnote continued)

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respect to the invasion of the principal of George Ewing's Testamentary Trust, the record is clear that plaintiff was neither actually nor constructively put on notice as to Citytrust's actions. Also, Citytrust's affirmative defenses (not argued in its brief) that the plaintiff's claims should be barred for being outside the statute of limitations and/or because of laches are without merit as to the issue on which the plaintiff is granted summary judgment. This is so because, but for a few exceptions not applicable here, the remedies of a beneficiary against a trustee are equitable in nature. Restatement § 197 (1959). Though the invasion claim for breach of fiduciary duty is a cause of action sounding in tort to which Conn. Gen. Stat. §52-577 three year statute of limitations applies (which the plaintiff's claim falls within), a court applying its equitable powers may provide a remedy for a claim even though the statute of limitations has expired (so long as it does not deem the action barred by laches). Carbone v. Atlantic Richfield Co., 204 Conn. 303, 327-27, 528 A.2d 1137 (1987). Because there has not been an "unreasonable, inexcusable, and prejudicial delay" in the plaintiff's prosecution of the invasion of principal claim, laches will not bar plaintiff's suit or recovery thereon. See id.

Furthermore, Michael Ewing's argument that Citytrust failed to apprise the Probate Court of his beneficiary status

(Footnote continued)

CONCLUSION

In all but one instance, the executors and trustees of the Ewing trusts acted within the bounds of discretion granted them. Only with respect to the final invasion of the principal of the George Ewing Testamentary Trust did Citytrust, acting as trustee, abuse its discretion.

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and his out-of-state address in the probate and accounting proceedings discussed herein need not be addressed. Insofar as the right to collaterally attack those proceeding and surcharge the defendants is predicated on showing an abuse of discretion, the Court's finding that no such abuse was shown except with the respect to the invasion of principal discussed above, obviates the need to resolve the notice issue. See Locke & Kohn, Connecticut Probate Practices § 106 (1951) (the trustee may be held liable to any party not given legal notice "**for the amount of the trust estate erroneously misapplied**, notwithstanding the ex parte acceptance of the trustee's accounts showing this misapplication . . ." (emphasis added).

Accordingly, partial summary judgment shall enter for the plaintiff only on the question of liability with regard to that issue.[7] Michael Ewing is hereby directed to submit an appropriate application on the question of damages within twenty days of the date of this ruling. Citytrust is to respond to that application not later than twenty days after it is filed. On the remaining issues involving the investment policy pursued by the executors and the trustees and the delegation of

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[7] The nature of the plaintiff's complaint makes it difficult if not impossible for the Court to grant judgment as to a specific count because the complaint seeks recovery for a "FIRST CLAIM", a "SECOND CLAIM", and a "THIRD CLAIM" which are not linked specifically to the particular abuses alleged in the plaintiff's motion for summary judgment. Therefore, the Court will refer to issues rather than counts.

investment powers to Alvin Ruml, partial summary judgment shall enter in favor of defendants Citytrust and the Estate of Alexander Ewing. Finally, neither plaintiff nor defendants have addressed the "THIRD CLAIM" of the complaint relating to an alleged improper distribution of principal from Myra Ewing's Testamentary Trust. Therefore, it is not encompassed within this Ruling.

Dated at Bridgeport, Connecticut this 21st day of November 1988.

/s/ T. F. Gilroy Daly
T. F. Gilroy Daly, CH. U.S.D.J.

89-7246/7258

United States Court of Appeals
for the
Second Circuit

MICHEAL EWING,

Plaintiff-Appellant-
Cross-Appellee

-against-

CITYTRUST and ALVIN RUML and
LYNDA EWING
As Executors of the Estate of
Alexander Ewing,

Defendants-Respodents-
Cross Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

APPELLANT'S BRIEF

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TABLE OF CONTENTS

Table of Authorities 1

Preliminary Statement..... 3

Issues Presented..... 3

Statement of the Case..... 5

Statement of Facts..... 9

Argument

I. Overview..... 26

II. Discretion and the Prudent Man Rule 38

III. Intent to Favor Income?.. 37

IV. Abuse of Discretion..... 74

V. Duty to Preserve..... 85

VI. Delegation to Ruml..... 89

Relief Sought..... 89

TABLE OF AUTHORITIES

1. Adickes v. S.H. Kress and Co., 398 U.S. 144 (1970)

2. 5 Am. Jur. 2d, Appeal & Error § 845

3. Bogart, Trusts & Trustees, 2nd Ed, Rev., 1982

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6. Connor v. Hart, 157 Conn. 265, 253 A.2d 9 (1968)

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PRELIMINARY STATEMENT

Appellant appeals from that part of the Ruling dated November 21, 1988, of the Honorable T.F. Gilroy Daly, United States District Judge for the District of Connecticut on Cross-Motions for Summary Judgment which was made in favor of appellee.

ISSUES PRESENTED

I. Was the discretion granted in the instruments here at issue sufficient as a matter of law to overcome the obligation of appellee to balance the competing interests of the income beneficiaries with those of the remaindermen in making investment decisions for the estates and trusts?

II. Do the three instruments here at issue manifest an intent of the testator/testatrix (with regard to the estates and the testamentary trusts) and the settlor (with regard to the intervivos trust) to favor production of income over preservation of the buying power of the corpus?

III. Was the court below clearly erroneous in holding that the appellee did not abuse whatever discretion was granted to it in the instruments by favoring the competing interests of the income beneficiaries over those of the remaindermen in making investment decisions for the estates and trusts?

IV. Was the holding of the court below that appellee did not breach its fiduciary duty to appellant by permitting Alexander Ewing to assign his duties as co-executor and co-trustee to Alvin Ruml clearly erroneous?

V. Is there a genuine issue of material fact on the question of whether appellee permitted a non-employee, Alvin Ruml, to have effective control over investment decisions for the estates and trusts?

STATEMENT OF THE CASE

Appellant commenced the case in the Southern District of New York by service a Summons and Complaint (Index #: 86 Civ 4840 JES) on appellee's New

York City branch office on or about June 19, 1986. Appellant alleged breach of fiduciary duty owed to him by appellee in its administration of the two estates and three trusts here at issue. Appellee denied the claim, moved to join the Estate of Alexander Ewing as a necessary party and to remove the action to the District of Connecticut. On Stipulation, the Complaint was amended to include as a defendant the Estate of Alexander Ewing and the matter was removed to the District of Connecticut on or about April 30, 1987, and assigned Index No. B87-314 (TFGD).

Appellee proceeded to take the deposition of Appellant on October 8, 1987. Appellant was granted the opportunity to examine documents

relevant to the case in appellee's possession on August 26, 1987, and requested copies of those it deemed relevant by letter to appellee's counsel dated September 30, 1987. Appellee finally made delivery of the documents requested on or about February 10, 1988.

On January 26, 1988, appellee moved the District Court to compel appellant to answer certain questions which he refused to answer during his deposition on advice of counsel and to compel appellant to fully and completely answer questions posed in appellee's interrogatories which appellee claimed appellant had answered in an incomplete and/or evasive manner. Before the District Court could rule on these pending motions, appellee made its

motion for summary judgment on February 22, 1988, thus short-circuiting the still incomplete discovery process and, in effect, abandoning its then pending motions to compel.

After a non-relevant procedural dispute between the District Court and appellant's trial counsel was resolved, appellant decided not to oppose the regularity of appellee's motion for summary judgment but, instead, to cross-move for summary judgment in the belief that the documents discovered from appellee and from Norwalk Probate Court records were sufficient to prove up his cause of action. Appellant's cross-motion for summary judgment was filed on April 22, 1988. Appellee's Reply Memorandum was filed on May 10, 1988, and the Ruling on which the

instant appeal is based was entered on November 21, 1988. Final Judgment in accord with said ruling was entered on February 10, 1989. Notice of appeal was filed by appellant on March 8, 1989, and Notice of Cross-Appeal was filed by appellee on March 10, 1989.

STATEMENT OF FACTS

At the heart of this case is the interpretation under Connecticut law of appellee's fiduciary duty to appellant pursuant to the terms of three instruments, the Last Will and Testament of Myra Goldsmith Ewing, set forth at A 199 - 210 ("Myra's Will"), the Last Will and Testament of George Ross MacKenzie Ewing, set forth at A 211 - 221 ("George's Will"), and the

Intervivos Trust of George Ross MacKenzie Ewing, set forth at A 270 - 274 ("George's Trust under Agreement"). Since these instruments cannot be interpreted in a vacuum, and since there are some issues which cannot be resolved within the four corners of these instruments, appellant will summarize first those facts believed to be undisputed (i.e., not controverted by appellee and/or so found by the Court below), then highlight those terms of each instrument which appellant believes to be relevant in this case, and finally those facts which may (if this Court does not otherwise dispose of this case) be both material and genuinely in dispute.

A. UNDISPUTED FACTS

1. Alexander Ewing was the sole issue of Myra and George Ewing and Michael Ewing is the sole issue of Alexander.

2. Appellee was co-executor, with Alexander Ewing, of the Estates of both Myra and George Ewing.

3. Appellee was sole trustee of the testamentary trust established by paragraph ELEVENTH of Myra's Will ("Myra's Testamentary Trust").

4. Appellee was sole trustee of George's Trust under Agreement.

5. Appellee was co-trustee, with Alexander Ewing of the testamentary trust established by paragraph TWELFTH ("George's Testamentary Trust").

6. Although appellant was over the age of twenty-one years and not a resident of the State of Connecticut at the time appellee caused Final Accountings for Myra's Estate and George's Estate to be filed, appellee never notified appellant of the filing thereof nor did appellee advise the Norwalk Probate Court of appellant's interest as a remainderman therein (Ewing Affidavit, p. 3, A - 187).

7. Alexander Ewing inherited $ 2,169,198.00 outright from Myra and George Ewing at their deaths in 1967 (Daly Ruling, p. 3, A - 396).

8. On November 28, 1969, Alexander Ewing had brokerage account with Hallgarten & Co. with a balance of $752,300.00 (Ewing Affidavit, p. 8, A - 192).

9. Appellee never even alleged that it made any investigation to ascertain Alexander Ewing's need for income during its administration of the estates and trusts.

10. Appellee never advised appellant of his rights in and to the estates and trusts here at issue (Ewing Affidavit, p. 5-7, A 189 - 191).

11. Appellee acquiesced in the improper delegation by Alexander Ewing of his responsibilities as a co-executor and as a co-trustee to Alvin Ruml, which was done without the knowledge or consent of appellant (Daly Ruling, p. 4., A - 397).

12. At her death, Myra Ewing had a diversified portfolio of blue-chip common stock (Inventory of her Estate, A 262 - 264) all of which appellee sold

within two (2) months after her death, converting the entire proceeds thereof into municipal bonds (Daly Ruling, p. 10, A - 403).

13. Within the first year after Myra Ewing's death, appellee lost $103,577.34 in trading municipal bonds in her estate (Daly Ruling, p. 10, A -403).

14. Appellee administered Myra's Estate and her Testamentary Trust at all times in a manner designed solely to maximize the income produced thereby for the benefit of Alexander Ewing without considering appellant's remainder interest therein and in spite of appellee's knowledge of the substantial wealth Alexander inherited outright from Myra and George Ewing upon their deaths:

> "Defendant Citytrust administered Myra's Trust to maximize income..."

Daly Ruling, p. 2, A - 395.

15. At his death, George Ewing had a diversified portfolio of blue-chip common stocks (Inventory of his Estate, A 265 - 269) all of which appellee sold in less than two (2) months after his, converting the entire proceeds thereof into municipal bonds (Daly Ruling, p. 10, A - 403).

16. Appellee administered George's Estate and Testamentary Trust at all times in a manner designed solely to maximize income for the benefit of Alexander Ewing without considering appellant's remainder interests therein and in spite of appellee's knowledge of the substantial wealth Alexander inherited outright from his parents upon their deaths:

> "...the George Ewing Testamentary Trust operated primarily as an income producer for Alexander..."

Daly Ruling, p. 3, A - 396.

17. George's Trust under Agreement was funded at its inception solely by IBM and Singer common stock (A - 274) which appellee proceeded to sell in order to administer George's Trust under Agreement at all times in a manner designed solely to maximize income for the benefit of Alexander Ewing without considering appellant's remainder interests therein and in spite of appellee's knowledge of the substantial wealth Alexander inherited outright from Myra and George:

> "This trust was administered at all times to maximize income without regard to preservation of the buying power of the corpus of the trust."

Daly Ruling, p. 5, A - 398.

18. When appellant learned for the first time in 1979 that he had rights as an income beneficiary in George's Testamentary Trust and his Trust under Agreement, appellee agreed to give appellant a monthly stipend of $2,000.00, to provide for which appellee then, without appellant's knowledge, proceeded to invade the principal of George's Trust under Agreement so that appellee could continue to give Alexander all of the income generated by all three trusts (Ewing Affidavit, Exhibits L-1 and L-2, A - 315, A - 318).

19. Prior to Alexander's death, appellant had no knowledge that the investment policy being pursued by

appellee in both estates and all three trusts had the effect of favoring the income beneficiaries over his remainder interests therein (Ewing Affidavit, P. 5 - 7, A 189 - 191).

20. Appellee violated its own written "Investment Policy" by administering the estate and trusts here at issue in a manner which favored production of income for income beneficiaries over preservation of the trust corpus for the remaindermen thereof (Ewing Affidavit, Exhibit K, A - 276, A - 314).

21. This Court can take judicial notice of the fact that during the seventeen (17) year period here at issue (1967 - 1984) the Consumer Price Index increased by 312% so that the buying power of the trust assets

distributed to appellant upon the death of Alexander had been reduced by a like amount as a result of appellee's investment policies pursued in both estates and in all three trusts.

22. After the pendency of this lawsuit, appellee changed the investments in that part of George's Trust under Agreement still under its administration to come into compliance with appellee's own guidelines and the requirements of Connecticut law to balance the competing interests of the new income beneficiary, appellant's stepmother, and the competing interests of the new remaindermen, her four children by her former marriage, by investing in a portfolio including substantial amounts of common stocks to preserve the buying power of the

remaining trust corpus (Appellant Memorandum of Law, p. 31, A - 144).

B. TERMS OF THE INSTRUMENTS

Although the investment powers granted in each Will to the Executors and Trustees are identical (Myra's Will, paragraph TWELFTH; George's Will, paragraph FOURTEENTH), the dispositive terms of Myra's Testamentary Trust (Myra's Will, paragraph ELEVENTH) differ materially from those of George's Testamentary Trust (George's Will, paragraph TWELFTH).

Specifically, paragraph ELEVENTH of Myra's Will requires the Executors of her Estate and the Trustees of her Testamentary Trust to pay the net income produced by the one-half of her

residuary estate placed in trust to her only child, Alexander, during his life, regardless of his need therefor, and then to pay the principal to Alexander's only child, Michael, the appellant herein, upon Alexander's death (provided that Michael is, at such time, at least thirty-five years of age. It is not disputed that appellant was 38 years old in October, 1984, when Alexander died.) There is no provision in Myra's Will permitting invasion of the principal during Alexander's lifetime.

In contrast, paragraph TWELFTH of George's Will provides that, with regard to the one-half of his residuary estate placed in trust, appellee, as executor and trustee, has the right but not the obligation, to pay the income

produced thereby to Alexander and/or Michael

> "...in such amounts and proportions as my said corporate Trustee [appellee] in its sole discretion shall deem advisable from time to time without regard to equality of distribution."

George's Will also authorizes:

> "...only my corporate Trustee in the administration of the Trust created by this paragraph to invade the principal for any reason in its discretion for the benefit of my said son, or the lawful issue of my said son living at the time of my death."

George's Will then directs that, upon Alexander's death, one-half of the corpus is to be distributed to appellant (so long as he is, at that time, at least 35 years old) while the other half of the corpus remains in trust, with the income produced thereby going to appellant's stepmother during

her life. Upon the death of appellant's stepmother, the half of the original corpus which remained in trust after Alexander's death is to be distributed, in equal parts, to the four children of appellant's stepmother by her prior marriage.

The investment powers provisions in George's Trust under Agreement are extremely similar to those set forth in his and Myra's Wills. The Wills give the executors and trustees the power "...B. To invest and reinvest without restriction or limitation." The Trust under Agreement gives the appellee the power "(1) To invest and reinvest in any property or security (including without limitation both common and preferred stocks) which it shall select; (2) to make retain or change

any investment without liability on account thereof..." All other investment powers granted in all three instruments are entirely unremarkable and have no conceivable bearing on the instant case.

The only difference in the dispositive terms between George's Testamentary Trust and his Trust under Agreement is that, in the Trust under Agreement, the appellee's discretion to invade principal for the benefit of Alexander and/or Michael is as broad as the appellee's discretion to apportion income between them while, in the Testamentary Trust, the appellee's discretion to invade principal is not as broad as the appellee's discretion to allocate income between Alexander and Michael. See Trust under

Agreement, paragraph 1 (A - 270). At Alexander's death, the corpus of the Trust under Agreement is to be treated the same as George's Testamentary Trust: one-half outright to appellant with the remaining one-half to remain in trust with appellant's stepmother as income beneficiary and her four children by prior marriage the remaindermen.

C. DISPUTED FACTS

1. Did Alvin Ruml exercise effective control over the investment decisions made in both estates and all three trusts?

2. Did appellee ever advise appellant of his rights in and to the two estates and the three trusts?

3. Did appellee ever consider appellant's needs in administration of the two estates and the three trusts?

ARGUMENT

I. OVERVIEW

Appellant's primary contention throughout this case has always been that appellee breached its fiduciary duty to appellant by making investment decisions in both estates and in all three trusts to maximize the production of income without regard to the competing interests of remaindermen in preservation of the buying power of the corpus. Both appellee and the Court below agree with appellant's contention that Connecticut law follows the general rule in most jurisdictions in

requiring a fiduciary to balance the competing interests of successive beneficiaries in making investment decisions in estates and trusts:

> "Naturally, even if the Trustee given the widest possible discretion, there is nevertheless a duty to deal impartially with successor beneficiaries."

Appellee Memorandum of Law, p. 3, A - 83.

> "Under normal circumstances, in the course of performing his duties, a trustee must strive to act with impartiality as to successive beneficiaries; he has no power to alter their respective beneficial interests. Gimbel at 34; Restatement § 183 (1959). Where there are successive beneficiaries, a trustee must balance their interests such that, on the one hand, he must not retain unproductive property likely to yield an income far below that which is normally earned by a like instrument, and on the other

> hand, he must not purchase or retain assets or property likely to waste or depreciate in value."

Daly Ruling, p. 14, A - 407.

Appellee argued, in its motion for summary judgment, among other theories, that its admitted conduct in favoring production of income over preservation of the buying power of the corpus was justified by the discretion allegedly given in all three instruments here at issue to favor the interests of the income beneficiaries over the competing interests of the remaindermen.

In a footnote to its decision, the Court below accepted appellee's argument in that regard:

> "By virtue of the grants of discretion in the trust instruments at issue, the prudent investor rule does not

> apply and defendants need only have acted in accordance with and not abused the discretion granted them to avoid liability. See United States Trust Co. v. Bohart, 197 Conn. 34, 48 495 A.2d 1034 (1985); Jackson v. Conland, 178 Conn. 52, 55-57, 420 A.2d 898 (1979)."

Daly Ruling, p. 8, A - 401.

Appellant respectfully urges that the Court below was clearly erroneous as a matter of law in so concluding for two reasons, which will be examined in Section II below. First, the Court below mistakenly concluded that whatever discretion does exist in the three instruments had the effect of relieving appellee of the constraints imposed under Connecticut law by the prudent man rule. The Court below then compounded the error by concluding that if appellee was not bound by the

prudent man rule it was automatically free to invest in a manner which favored maximizing income over preservation of the buying power of the corpus of the estates and trusts. Simply put, appellant believes that there is no necessary connection between the application of the prudent man rule to a trustee's investment powers and the other obligations of a trustee/executor to a beneficiary, including, without limitation, the duty to act impartially as to successor beneficiaries.

Appellee also argued that the terms of all three instruments manifest an intent to favor production of income over preservation of the buying power of the corpus. The Court below agreed with regard to both George Ewing's

Testamentary Trust and his Trust under Agreement:

> "The designation...of Alexander and Michael Ewing as co-income beneficiaries also supports the decision to sell George's stock portfolio and exchange it for a bond portfolio that would support, if necessary two income beneficiaries who were also granted principal invasion powers. For all these reasons, the Court holds that the executors' actions in liquidating the stock holdings of Myra and George Ewing's Estates and exchanging them for bond holdings, were not an abuse of discretion."

Daly Ruling, p. 11, A - 404.

> "Insofar as this instrument names two income beneficiaries and authorizes invasion of the principal by either of the income beneficiaries essentially without restriction, the Court holds that it was not the primary intent of the settlor to ensure the substantial appreciation of the trust corpus for the remaindermen. The primary intent of the settlor in this instance appears to have been to provide the two income

> beneficiaries with a fund upon which they could draw income and invade principal as the need arose."

Daly Ruling, p. 13, A - 406.

Appellant respectfully urges that the Court below was clearly erroneous as a matter of law in so concluding for two reasons which will be fully examined in Section III hereinbelow. First, the Court neglected to note that this reasoning cannot be applied to Myra's Testamentary Trust. Secondly, this Court will note that neither George's Will nor George's Trust under Agreement authorize invasion of the corpus "by either of the income beneficiaries without restriction" as the Court below held. Rather, appellee, and appellee alone, is given discretion to invade the corpus of

either trust for the benefit of either appellant, his father or both. Simply put, the Court below ignores the plain meaning of the dispositive provisions of the instruments and then compounds its error by failing to construe the meaning thereof in light of the circumstances surrounding the execution thereof as is clearly mandated by Connecticut law. See Connecticut Bank & Trust Co. v. Lyman, 148 Conn. 273, 278-79, 170 A.2d 130 (1961).

Appellant also contends that, even if appellee had such wide discretion, the Court below was clearly erroneous as a matter of law in concluding that appellee did not abuse such discretion (See Section IV below). Finally, in the event that the Circuit Court of Appeals does not agree with appellant

on the foregoing issues, appellant will urge the Circuit Court to remand to the District Court for trial on the issue of whether appellee breached its fiduciary duly to appellant by permitting Alvin Ruml, not an employee of appellee, to have effective control of investment decisions made for both estates and all three trusts. The standard of review here is whether the facts on each issue, construed most favorably to appellant, disclose a genuine issue of material fact. Appellant contends that, with regard to this claim, appellee did not extinguish all issues of material fact and therefore did not discharge its burden. The grant of its summary judgment motion should therefore be reversed.

Appellant notes that, on appeal, a grant of summary judgment is subject to de novo review by the Circuit Court of Appeals, applying the same standard that the Court below applied or should have applied. Lew v. Kona Hospital, 754 F.2d 1420, 1423 (9th Cir. 1985); Trnka v. Elanco Products Co., 709 F.2d 1223, 1224,25 (8th Cir. 1983).

In reviewing a finding based on undisputed facts, the Circuit Court of Appeals will not defer to the Court below, but treats the finding as a mere question of law, to be overturned if clearly erroneous:

> A finding of a trial judge which rests on conclusions drawn from undisputed facts or nonconflicting evidence generally does not carry the same weight on appeal as a finding resting on disputed

> facts or conflicting evidence, but may be treated on appeal as if it were a legal conclusion, subject to the principle that were a point of law is concerned, the appellate court is not committed to the view taken by the court below.

5 Am. Jur. 2d, Appeal & Error § 845, 288-89 (1962).

In applying the clearly erroneous standard, the Court of Appeals accords less deference to the Court below in the type of situation underlying this appeal than where such a Court heard witnesses:

> We have noted, however, that "the degree of deference to be accorded a district court's findings of fact is lower when the case is submitted wholly on documents than in the situation where the evidence is presented by witnesses appearing before the district court."

Bull's Corner Restaurant v. Director, Federal Emergency Management Agency, 759 F.2d 500, 502 (5th Cir. 1985).

Appellant also notes that in actions involving trusts, the strict standard mandates denial unless the movant (appellee) can meet its burden of establishing that there was no issue of material fact as to whether there has been an actionable breach of the trust relationship. Preston v. United States Trust Co. of New York, 394 F.2d 456, 461 (2d Cir. 1968), cert. denied, 393 U.S. 1019 (1969). In general, the movant (appellee) has "the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodge[s] must be viewed in the light most favorable

to the opposing party." Adickes v. S.H. Kress and Co., 398 U.S. 144, 158 (1970). Thus, the Court's function on a motion for summary judgment, or on appeal from the granting of one, is to determine whether any genuine issue exists, not to resolve conflicting inferences arising therefrom or to make findings of fact. Schering Corp. v. Home Insurance Co., 712 F.2d 4, 9 (2d Cir. 1983).

II. DISCRETION AND THE PRUDENT MAN RULE

Appellant believes that there is no dispute that under Connecticut law, as in most other jurisdictions, a party acting as an executor or as a trustee owes a number of well defined duties to

the beneficiaries of the estate and/or trust. Among these are the duty not to delegate; the duty of loyalty; the duty to act impartially between different beneficiaries (whether simultaneous or successive); and the duty to invest the corpus with the care of a prudent man. That Connecticut law follows these general principals will be made amply clear as we examine the cases cited by the Court below. The cited cases stand only for the proposition, not disputed by appellant, that a testator or a settlor <u>can</u> relieve his executor or his trustee of the duty to balance the competing interests of the income beneficiaries with those of the remaindermen <u>either</u> by means of language to that effect in the instrument's dispositive provisions, <u>or</u>

by the necessary effect of following mandatory instructions in the investment powers provisions of the instrument. Appellant simply contends that the instruments here at issue do not do so.

The Court below apparently concluded that the investment powers provisions set forth in all three instruments had the effect of waiving the prudent man rule, and that waiver of the prudent man rule gave appellee the discretion to favor the income beneficiaries over the competing interests of the remaindermen. See Daly Ruling, p. 8, A - 401.

Appellant contends that the reasoning of the Court below is fundamentally flawed because even if a testator or settlor waived the prudent

man rule, the executor or trustee would still be bound to deal impartially with successive beneficiaries.

Appellant contends that the cases cited by the Court below make it abundantly clear that Connecticut law does not permit interpretation of investment powers (administrative) provisions to alter the dispositive provisions except in cases where the executor/trustee is expressly required to retain assets of the testator/settlor and compliance with such instructions necessarily effects the amount of income produced or limits the fiduciary's ability to preserve the buying power of the corpus. Whatever discretion may exist in the language cited by the Court below relating to appellee's power to hold and retain

assets of the estates can be ignored since it is clear that appellee chose to retain none of the blue-chip stocks with which Myra and George Ewing died seized.

Thus, the only discretion accorded to appellee in the investment powers provisions of either Will relevant in this case is the power "to invest and reinvest without restriction or limitation." As we have seen, George's Trust Under Agreement has only slightly and immaterially different language in its investment powers provisions. The question then becomes what did Myra and George Ewing intend in giving appellee the power "to invest and reinvest without restriction or limitation"? Does this language give appellee sufficient discretion to support its

admitted conduct of administering both estates and all three trusts at all times in a manner calculated to maximize income without regard to preservation of the buying power of the corpus for the remaindermen?

The cases cited by the Court below in its footnote simply cannot be read to support such an expansive interpretation of the investment powers language here at issue. In United States Trust Co. v. Bohart, 197 Conn. 34, 495 A.2d 1034 (1985) Chief Justice Peters noted that the settlor was the president, founder and major shareholder of Prentice-Hall, Inc., whose stock was the principal asset of the trust (United States Trust Co. v. Bohart, supra, at 36). In that case the defendant's complaint was that the

trustee should have diversified the trust corpus by selling the Prentice-Hall stock before it fell sharply in value in 1972-73 (Id. at 48). Chief Justice Peters concluded that:

> "The law governing the duties of a trustee respecting investment of trust assets is well settled. Generally, a trustee must act with the care of a prudent investor. Jackson v. Conland, 178 Conn. 52, 55 420 A.2d 898 (1979); 1 Restatement (Second), Trusts (1959) § 174. A trust agreement may, however, "specifically permit trustees to invest in speculative or otherwise hazardous investments." Jackson v. Conland, supra; see 1 Restatement (Second), Trusts (1959) § 174, comment d. When a trustee has been vested with such discretion, liability attaches only if the discretion is abused. McCarthy v. Tierney, 116 Conn. 588, 591-92, 165 A.807 (1933); see Conway v. Emeny, 139 Conn. 612, 619, 96 A.2d 221 (1953).

> The record in this case reveals that the plaintiff was acorded the discretion to act as it did. The second paragraph of the trust agreement provides in relevant part: "The Trustee is specifically authorized to continue to hold the property as received from the Settlors...." As the trial court found, one of the settlors' motivations for creating a trust composed almost exclusively of Prentice-Hall stock was to preserve family control of the company....While, in retrospect, the value of the trust could have been maximized had the plaintiff divined the downward course of the stock market in the 1970's, we cannot say that it abused the discretion specifically granted it in continuing to hold Prentice-Hall stock."

Id. at 48-49.

Appellant contends that the holding of the Bohart case cannot be used to interpret the investment powers language in the three instruments as an intent on the part of George or Myra

Ewing to either waive the prudent man rule or to favor production of income over preservation of the buying power of the corpus. The other case cited by the Court below in the footnote is equally inapplicable to the investment powers language here at issue. In Jackson v. Conland, 179 Conn. 52, 420 A.2d 898 (1979), the settlor created a trust funded by all but two of the 30,011 shares of a newspaper owned and published by the settlor (420 A.2d at 900). The beneficiaries sued complaining that the trustee breached its fiduciary duty to them by buying another newspaper which turned out to be a money losing venture (420 A.2d at 900). The Jackson Court affirmed that the trustees had discretion under the instrument to purchase the money losing

newspaper because the trust instrument had investment powers language much, much broader than that contained in the three instruments here at issue:

> "In the preamble to the section of the trust indenture which sets forth the powers and duties of the trustees, the settlor states he intends to "enable the trustees to act forcefully and unhampered by [the] limitations frequently imposed upon fiduciaries." Pursuant to that purpose, he then directs that in the administration of the trust the trustees may "retain as principal all or any part of the property ... transferred to them ... or they may at any time ... sell [such property]" and that "in exercising their discretion with respect to this matter, they shall not be influenced solely by the character of the newspaper business, which is inherently hazardous."
> ...."[n]o trustee shall be held liable to any beneficiary ... for any act or omission to act as such trustee or as a director or officer of any

> corporation stocks or other securities of which are held as an asset of such fund unless such act or omission to act constituted willful misconduct on his part." The above provisions reveal clearly that it was the settlor's intent to relieve the trustees of the limitations otherwise imposed upon their actions by the prudent investor rule." (emphasis added)

420 A.2d at 900-901.

If anything, the Bohart and Conland cases stand for the proposition that the duties of an executor and/or trustee to beneficiaries cannot be altered by language in the investment powers provisions unless such language expressly mandates altering the normal duties of the executor/trustee. Moreover, both these leading cases make it clear that even if testator or settlor does expressly waive the prudent man rule, that alone will not

suffice to permit an executor or trustee to invest in a manner which alters the respective rights of successive beneficiaries. Appellant contends that to accept the interpretation made by the Court below of the investment powers language in the three instruments here at issue is tantamount to rewriting the dispositive provisions of these three instruments and every Connecticut will and trust containing similar investment powers language. See Connor v. Hart, 157 Conn. 265, 276 (1968):

> "It certainly would constitute a violent and wholly unwarranted repudiation and reversal of heretofore settled Connecticut trust law to construe any or all of these administrative powers conferred on the trustees as powers which, separately or collectively, authorized the trustees to destroy or cripple

> a charitable bequest....For the trustee so to do would be an impermissible and illegal abuse of discretion and would obviously be in violation of the settled rule that "[w]hen there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them" Restatement (Second), 1 Trusts 183."

Appellant urges that the investment powers language in the three instruments here at issue is merely "boilerplate" left over from the time in Connecticut when, prior to 1949, permissible investments for fiduciaries were strictly limited by law. In discussing investments permitted by Connecticut law, Bogart notes:

> Prior Law
>
> Prior to 1949 a statutory legal list was in effect limiting the investment of trust funds to mortgages secured by real estate, state and local obligations, savings bank deposits and the capital

> stock of any state-chartered insurance company. Conn. - Gen.St. 1930, §§ 4836-4837.

Bogart, Trusts and Trustees, 2nd Ed. Rev. (1982), § 622, p. 141.

Because the so-called "statutory list" was so restrictive, wills and trust instruments were commonly drafted to give the fiduciary more liberal investment powers. Although Connecticut adopted the "prudent man" rule in 1949 (C.G.S. § 6393 (1949)), Bogart notes that:

> "...this statute and the present statute (C.G.S.A. §§ 45-88 and 45-89) establish types of investments in which trustees, guardians and conservators may invest "with the care of a prudent investor."

Bogart, supra, § 622, p. 129.

As pointed out in appellant's Memorandum of Law in support of its Motion for Summary Judgment, p. 27-28 A 140 - 141, Connecticut Law provides a specific statutory method for enlarging the fiduciary's investment powers which was not utilized in any of the three instruments here at issue. It is appellant's contention that the language investment powers in the three instruments was merely intended to permit appellee to invest as a "prudent man" without being limited to the type of investments set forth in C.G.S. §45-88.

In discussing discretionary investments permissible by a trustee in light of the "prudent man" rule, Bogart notes:

> "u. Interpretation of the terms of the trust. When discretion as to investments is conferred upon the trustee by the terms of the trust, it is a question of interpretation whether and to what extent the settlor intends to enlarge the scope of permissible investments. If by the terms of the trust the trustee is authorized to make investments "in his discretion," such an authorization does not ordinarily permit the trustee to make investments other than those which a prudent man would make under the rule stated in Clause (a). By the terms of the trust, however, the trustee may be permitted to invest in securities which are speculative or otherwise improper under the rule stated in Clause (a). The provisions of the trust instrument are ordinarily strictly construed against an enlargement of the scope of permissible investments beyond those allowed under the rule stated in Clause (a)."

Bogart, supra, §227, p. 538-9 (emphasis added).

Bogart then notes:

> "y. Successive beneficiaries. An investment which would not otherwise be improper as a trust investment is improper where the trust is created for successive beneficiaries, if the investment would be unduly favorable to one beneficiary at the expense of the other. See §232."

Bogart, supra, § 227, p. 540.

Appellant contends that the investment powers language in the three instruments here at issue should: (a) be construed only to enlarge appellee's authority from investing as a prudent man in the specific categories of investments set forth in C.G.S. 45-88 to investing as a prudent man without being limited to the specific categories of investments set forth in C.G.S.45-88 and (b) not be construed to alter appellee's obligation to balance the competing interests of the income

beneficiaries with those of the remaindermen.

Appellant also points to the fact that the investment powers paragraphs of both Myra's Will and George's Will are identical word for word, while, as has been previously emphasized hereinabove, the dispositive provisions of their respective Wills differ very distinctly. The investment powers language in George's Trust under Agreement is only slightly and immaterially different. This should also lead to the conclusion that the investment powers provisions in the three instruments here at issue are mere "boilerplate" designed solely to allow appellee to make investment decisions as a "prudent man" instead of limiting investments to those types set

forth in the law, to be made as the statute requires "with the care of a prudent investor."

If this Court is not convinced that appellant's arguments on this issue require reversal of the Court below, appellant respectfully urges the interpretation of the investment powers provisions of the three instruments here at issue is a genuine issue of material fact for the determination of which this Court should remand this case back to the District Court for a trial wherein the parties can offer expert testimony to elucidate the meaning of the words in question.

III. INTENT TO FAVOR INCOME?

Appellant agrees with the Court

below which found that Connecticut law requires that the testatrix's "expressed intent must control," citing Connecticut Bank & Trust Co. v. Lyman, supra, at 278-79, Daly Ruling, p. 9. A - 402.

A. MYRA'S WILL

In construing Myra Ewing's intent, the Court below first concludes that:

> "...the language of Myra's Testamentary Trust indicates neither a preference to favor the income beneficiary nor the principal beneficiary. The fact that there is no language authorizing an invasion of the corpus for the benefit of the plaintiff or his father indicates an intent to create some rough equivalency between their competing interest."

Daly Ruling, p. 12, A - 405.

The Court below, nevertheless, then proceeds to approve appellee's conduct of maximizing income in Myra's Estate and her Testamentary Trust by concluding that:

> "...to the extent that there are no restrictions or limitations on the income to be paid to Alexander, the Court is not prepared to override the judgment of Myra's executors to provide for such income by the sale of stocks and the purchase of bonds.... As a practical matter, it may have been more efficient to use Myra's trust as the main income producing source for Alexander Ewing since this trust was the only one of the three to name Alexander as the sole income beneficiary."

Daly Ruling, p. 11, A - 404.

Appellant contends that this conclusion is clearly erroneous as a matter of law. To begin with, it

simply makes no sense in light of the undisputed fact that appellee administered both estates and all three trusts at all times to maximize income for Alexander without regard to appellant's remainder interest. Secondly, it contradicts the very plain dispositive language of Myra's Will which requires that all income be paid over to Alexander, regardless of his need therefor, and requires that the corpus of her Testamentary Trust be paid over to appellant herein without permitting any invasion of the principal thereof for any reason whatsoever. Appellant renews the argument it made to the Court below that, in the normal scheme of events, power to invade the corpus is routinely given to the executor and trustee to be

exercised in their discretion in the event that any beneficiary has real need thereof due to unusual circumstances not foreseen or foreseeable when the instrument was executed. Appellant contends that Myra's Will is unusual in denying such power of invasion and that the Court below clearly erred as a matter of law in not giving due effect to the absence of such power to invade the corpus. Appellant contends that the absence of power to invade the corpus leads inescapably to the conclusion that Myra Ewing wanted the appellee to administer her estate and her Testamentary Trust in a manner which balanced the competing interests of the sole income beneficiary with those of the sole remainderman.

Appellant also contends that, in construing Myra's Will, the Court below neglected to consider the circumstances which existed when Myra Ewing executed her Will as the Court below recognized is mandated by Connecticut law. In the absence of proof to the contrary, it must be assumed that Myra Ewing knew that her income beneficiary, her only child, Alexander, would inherit outright from herself and her husband, George, more than Two Million Dollars. It must also be assumed that Myra Ewing knew that her sole grandchild, appellant herein, would inherit only the remaining corpus her trust upon her son's death (since at the time Myra executed her Will, in 1966, her husband George had not, as yet, made any residuary provision for appellant - which he did only in 1967).

Under these circumstances, appellant respectfully urges that the dispositive provisions of Myra's Will must be read to infer an intent on her part to require her executors and her trustee to balance the competing interests of her income beneficiary with those of her remainderman, which appellee admittedly failed to do in making investment decisions for her estate and her Testamentary Trust. Accordingly, appellant contents that appellee must be surcharged for its brazen refusal to follow the plain mandate of Myra's Will.

B. GEORGE'S WILL AND TRUST UNDER AGREEMENT

George's Will and his Trust under Agreement admittedly give appellee, not

the income beneficiaries as the Court below seems to have believed, the discretion to allocate income between appellant and his father and the discretion to invade the corpus for either or both of them. In sharp contrast to Myra's Will, neither instrument requires appellee to distribute any income to either appellant or his father or to invade the corpus for either or both of them. The Court below cites Gimbel v. Bernard F. & Alva B. Gimbel Foundation, Inc., 166 Conn. 21, 36, 347 A.2d 81 (1974) and Kimball v. New England Trust Co., 14 Conn. Supp. 432 (1947) as mandating interpretation of this discretion to require appellee to favor income

production over preservation of the buying power of the corpus.

The fact pattern of the Gimbel case bears almost no resemblance to that of the instant case. The only similarity is that in Gimbel, as in the instant case, the court was asked to construe the powers of the executors and testamentary trustees to make certain investments which altered the competing interests of an income beneficiary with those of a remainderman (Gimbel, supra, at 23). As this court can see, there is no discretion accorded in the dispositive provisions of the Gimbel Will and there is no power to invade the corpus. In Gimbel, the discretion is solely in the Will's investment powers paragraph:

> "In contrast to the simplicity of these [dispositive] provisions, the thirteenth article of the will set forth in twenty-three paragraphs a detailed specification of rights, powers and authority granted to the trustees "in furtherance and not in limitation or restriction of those conferred upon them by law." The settlor expressly provided that any or all of these powers might be exercised by the trustees "in whole or in part, at any time or times and from time to time, in their sole, absolute and uncontrolled discretion, in such manner as they deem advisable, without liability and without the necessity of obtaining any order or the approval of any court."

Gimbel, supra, at 26-27. The Gimbel estate had essentially three assets: interests in oil and gas properties worth $210,005.12; 11,000 shares of Gimbel Brothers, Inc., worth just under $600,000.00; and 41,600 shares of Occidental worth $1,666,600.00. The

question the executors and trustees posed to the court was:

> "D. May the executors and trustees exercise the powers, authorities and discretions conferred upon them by the Will in such a manner as to alter substantially the value of the respective interests of the income beneficiary and the remainderman (1) in oil and gas property interests; (2) in the estate and trust assets, other than oil and gas property interests."

Gimbel, supra, at 27-28.

In deciding how to answer this question, the Gimbel court noted:

> "Although the settlor imparted to the trustees the widest possible discretion, they are, nonetheless, under a duty to deal impartially with the successive beneficiaries. Connor v. Hart, 157 Conn. 265, 277, 253 A.2d 9; Restatement (Second), 1 Trusts §§ 183, 232. "[T]he interests of the two beneficiaries are to a certain extent antagonistic, and the trustee is under a duty so to

> administer the trust as to preserve a fair balance between them." 3 Scott, Trusts (3d Ed.) § 232. In the Connor case, we stated (p. 274): "Although the use of the term 'sole discretion' confers a wide discretion, no language in a trust will be so construed as to remove a trustee from equitable control. 'To the extent to which the trustees had discretion, the court will not attempt to control their exercise of it as long as they have not abused it.... But the law will not tolerate its abuse, however great the creator of the trust intended the grant of discretion to be.' Conway v.Emeny,...[139 Conn. 612, 619, 96 A.2d 221]. This rule applies even when the will has used the term 'absolute' or 'sole' discretion. Ibid. The same rule is recognized in Connecticut Bank & Trust Co. v. Lyman, 148 Conn. 273, 281, 170 A.2d 130."

Gimbel, supra, at 34-35.

The answer the Gimbel court came to supports only the appellant's position herein:

> "While the settlor's will in article thirteenth both greatly enlarges the administrative powers of the trustees and insulates them from liability for the exercise of those powers, they have been given no dispositive, as distinguished from administrative, powers and there is nothing in the will which would allow the executors and trustees to exercise any of their administrative powers to alter substantially the value of the respective interests of the income beneficiary and the remainderman either in the oil and gas interests or the other trust assets. Our answer to questions B (5), C and D is "No.""(emphasis added)

Gimbel, supra, at 35-36.

In examining the Kimball case, appellant notes that this decision was made in 1947, not 1977, as the Court below erroneously noted, and that this lower Connecticut court decision was made before Connecticut adopted the current, limited prudent man rule (embodied in C.G.S. 45-88) in 1949.

A careful reading of the Kimball case reveals that it, also, has no applicability to the instant case. In Kimball, the trust was initially funded with blue-chip stocks and the trustee was directed to pay the income produced by the corpus to named income beneficiaries for their lives and, on the death of the last income beneficiary, to distribute the corpus to remaindermen. (Kimball, supra, at 433 and 435) The case does not indicate if there was any power to invade the corpus. The Kimball Will gave his executors and testamentary trustees "to invest and reinvest the [corpus], and, in its discretion, to sell the same..." (Kimball, supra, at 434). The Will also stated that "...in no event shall the Executor be liable

for any loss or depreciation of property held by it as Executor hereunder unless such loss occurs through its bad faith or wilful default." (Kimball, supra, at 434). The remaindermen complained of losses incurred by the executor in selling blue-chip stocks (primarily AT&T and GE) during the depressed stock market conditions which prevailed during World War II in order to diversify the portfolio of the estate.

The Kimball court notes that under Connecticut law

> "[t]he executor's primary duty is to settle the estate, pay debts, and make distribution, and not to sell and reinvest the assets....The general rule as to the duty of a trustee is that he must exercise due diligence in light of the particular circumstances surrounding the administration of his trust. [citations omitted]...He must

> act as a prudent man under the circumstances [citations omitted]."

Kimball, supra, at 440.

The Kimball Court then noted that:

> "...the acts of this executor-trustee must be examined in the light of the "exculpatory clauses" of this will."

Kimball, supra, at 440, primarily as a result of which the Kimball court concluded that the trustee had not breached its fiduciary duty to the remaindermen.

Simply put, it is appellant's position that none of the Connecticut cases cited by the Court below can be read to support the position that either a grant of discretion to allocate income among various income beneficiaries or a grant of discretion

to invade principal for the benefit of one or more income beneficiaries can be interpreted to indicate an intent by George Ewing to authorize appellee to make investment decisions for his estate, his Testamentary Trust, or his Trust under Agreement which have the effect of favoring income production over preservation of the buying power of the corpus. Moreover, the Court should note that the dispositive terms of George's Will and Trust under Agreement do not come within the only exception to such duty to balance interests which is when the income beneficiaries and the remaindermen (whether one or more) are the same individuals or parties. In the instant case, Alexander Ewing is not a remainderman and some of the

remaindermen (Lynda Ewing and her children by her prior marriage) are not income beneficiaries. To the extent that the Court below relied upon the fact that appellant was both one of the income beneficiaries and one of the remaindermen, appellant respectfully urges that such reliance is clearly erroneous as a matter of law.

Appellant also respectfully contends that the Court below misconstrued the meaning of the dispositive provisions in George's Will and his Trust under Agreement in ignoring the significant wealth Alexander Ewing inherited outright from his parents and in ignoring George Ewing's apparent intent in both instruments to provide for remaindermen who were not also income beneficiaries

- Lynda Ewing and her four children by her prior marriage. The interpretation which the Court below made of the discretion George Ewing granted to appellee makes a mockery of the clear intent envisioned by the plain language of his will and Trust under Agreement. Accordingly, appellant contends that appellee must be surcharged for brazenly ignoring George Ewing's clear intent.

IV. ABUSE OF DISCRETION

Even if this Court sustains the decision of the Court below that all three of the instruments here at issue gave appellee the discretion to make investment decisions in a manner favoring the income beneficiaries over

appellant's remainder interests therein, appellant respectfully urges that the decision of the Court below was clearly erroneous as a matter of law in holding that appellee's conduct did not constitute an abuse of such discretion. Appellee justifies its conduct ... "[b]ecause of the income needs of Alexander ..." (Appellee Memorandum of Law, p. 2, A - 82), and that "...it was clearly the duty of the Trustee to provide the necessary income for Alexander." (Appellee Memorandum of Law, p. 5, A - 82, emphasis added), without ever offering even one shred of evidence that appellee either investigated Alexander's need for income or that Alexander in fact had any such need. On the contrary, "...Alexander inherited outright from

his parents' estates [in 1967] approximately $2,169,198.00..." (Daly Ruling, p. 3, A - 396). Although not cited by the Court below, it is also undisputed that Alexander had a trading account with the brokerage firm of Hallgarten & Co., which had a balance of $752,300.00 on November 28, 1969 (Affidavit of Ewing, Exhibit Q, A - 360).

Appellant asks this Court to take judicial notice of the fact that Two Million Dollars was a great deal of money in 1967, and, even with the substantial inflation which has since occurred, is still a rather tidy sum. Given the substantial wealth Alexander inherited, even if he had no other means of support, appellant contends that this Court should conclude as a

matter of law that appellee abused whatever discretion it had pursuant to the terms of the three instruments by administering both estates an all three trusts from their inception (literally within months after the deaths of Myra and George) solely to maximize income for the benefit of Alexander.

Appellee also argues that the discretion given to it to invade principal (in George's trusts only!) is sufficient to permit appellee "...to invade the principal and pay the entire amount to Alexander...". (Appellee Memorandum, p. 14, A - 94.) Appellee's argument would permit it to invade the principal to support, for example, gambling on horses by Alexander. The Gimbel decision makes it clear that no grant of discretion is broad enough to

permit such a result. In considering this argument advanced by appellee, this Court must note that appellee has never offered any justification for its invasions of principal, even though it is clear as a matter of law that no discretion is untrammeled. This is an abuse of discretion.

Appellee then urged upon the Court below the theory that it had discretion to maximize income produced by both estates and all three trusts to avoid the necessity to invade the corpus thereof to provide for Alexander's alleged but never documented needs: "...[Citytrust] attempted to maximize income to meet the needs of Alexander....without invasion of principal, in an attempt to preserve the estate." (Appellee Memorandum of

Law, p. 3, A - 83). Appellant notes that this theory is totally inconsistent with the justification offered by appellee above. Also, appellee cites no law to support its extremely novel theory in this regard. In fact, such theory is totally inconsistent with the undisputed requirement of Connecticut law requiring a fiduciary to balance the competing interests of successive beneficiaries, and conflicts with appellee's own internal "Investment Policy" guidelines set forth at A 276 - 314!!.

Sensing that it could not prevail on the theory of reasonable exercise of discretion granted to it in the three instruments, and admitting "[t]here is no material dispute as to the

investment policy [pursued by appellee]...." appellee urged upon the Court below that "[t]he Trustee, in fact, made investments to increase income for Michael's father as it was obligated to do under the trust instruments." (Appellee's Memorandum of Law, P. 15, A - 95). Since appellant has shown in hereinabove that the instruments cannot be read to permit or mandate such discrimination in favor of an income beneficiary over the competing interests of the remaindermen, appellee's admitted conduct in doing so must be held to be an abuse of discretion as a matter of law.

Although appellee also contended that its conduct in administering the estates was justified because it sold

"...high concentrations of speculative securities..." (Appellee Memorandum of Law, p. 2, A - 82), the Court below found that appellee, in George's estate "...sold his blue-chip stock holdings..." (Daly Ruling, p. 10, A - 403), and "...in the case of Myra Ewing's Estate, two months after her death her stock holdings of General Electric, Eastman Kodak Co., IBM, Singer, Standard Oil, etc., were sold..." (Daly Ruling, p. 10, A - 403). Moreover, the Court below held that:

> "Nine months later in December 1967, these same executors sold these municipal bonds at a loss of $103,577.00 and the proceeds were again used to purchase municipal bonds." (Daly Ruling p. 10, A - 403).

This is not the appropriate liquidation of "speculative securities" as appellee contends, but a clear abuse for which appellee ought to be surcharged.

One of the reasons the Court below found the conduct of appellee not to be an abuse of discretion was because some income went to appellant and because some invasions of principal were made for appellant's benefit:

> "...all requests made by plaintiff for additional allowance, or monies, from defendant during his father's lifetime were acceded to and were sufficient to meet his living expenses and other needs." (Daly Ruling, pg. 5, A - 398).
>
> "As an income beneficiary of the George Ewing Testamentary Trust, Michael Ewing received a $66,000.00 distribution of income and principal in September 1968. Furthermore, the principal of the same trust was invaded for his benefit on other occasions and without

> objection in the amount of at least $60,000.00. Likewise, the principal of the George Ewing Inter Vivos Trust was invaded for Michael's benefit without objection, in the amount of $15,000.00 in 1982 for his medical expenses, and in the amount of $24,000.00 respectively in both 1983 and 1984 for his living expenses." (Daly Ruling, p. 15-16, A 408 - 409).

Although appellant received no income on a regular basis from the estates or trusts prior to 1979, the entire issue of what money flowed to appellant prior to his father's death is legally irrelevant because, as the Court below did recognize:

> "...the plaintiff is not contesting the income allocations from either of the George Ewing Trusts between plaintiff and his father or the invasions of principal for his father under the George Ewing Inter Vivos Trust." (Daly Ruling, p. 5-6, A 398 - 399).

The real point here is that appellee has never even alleged hat it ever considered appellant's needs during the seventeen year period of its administration of the estates and trusts here at issue. This court must conclude as a matter of law that appellee's total failure to consider appellant's needs makes the investment policy of maximizing income over the competing interest of preserving the buying power of the trust corpus an abuse of discretion.

In fact, what stands out is that appellee always gave virtually all income in both estates and all three trust to Alexander while it always invaded the principal of one or the other of George's two trusts in these

few occasions when it did determine to provide money for appellant. It is respectfully urged that such conduct is clear evidence of an abuse of discretion by appellee.

V. DUTY TO PRESERVE

Althcugh appellant never argued that the instruments here at issue required appellee to guarantee substantial appreciation of the corpus of the estates and trusts, appellant disagrees with the holding of the Court below that:

> "Based on the Court's holding that it was not the primary intent of the two George Ewing Trusts to ensure the substantial appreciation of the corpus for the remaindermen and the fact that these trusts

> granted the trustees liberal investment powers, the defendants had the discretion to favor the interests of the income beneficiaries -- one of whom was in fact the plaintiff."

Daly Ruling, P. 15, A - 408.

The Court below also observes that since appellant inherited over One Million Dollars from Myra's Testamentary Trust and George's Trust Under Agreement, his instant complaint is like those of the Kimball remaindermen who complained they would have inherited more if the trustee has made better investments (Daly Ruling, p. 16-17, A 409 - 410). The Court below entirely misconstrues the nature of appellant's complaint, and completely ignores the precedent cited in Dennis v. Rhode Island Hospital Trust National Bank, 571 F. Supp. 623

(P. Rhode Island, 1983). On appeal of that case, the First Circuit confirmed that the trustee had violated its duty to deal impartially with successor beneficiaries and held that:

> "For one thing, it seems reasonable for the court - in devising a remedy for the trustee's violation of its duty of impartiality - to assume that a fair trustee would have maintained the property's real value from 1950 through 1982....Such an assumption is consistent with basic trust law policies of providing income to income beneficiaries while preserving principal for the remaindermen,....Where a court is trying to create, not a measure of the trustee's duty, but simply a plausible reconstruction of what would have occurred to a hypothetical 1950 reinvestment, we see nothing unreasonable in assuming that the value of the corpus would have kept pace with inflation." (emphasis added)

Dennis v. Rhode Island Hospital Trust National Bank, 744 F.2d 893, 900 (1984).

It is appellant's contention that what appellee did in the estates and trusts here at issue is fundamentally no different that the breach committed by the corporate trustee in the Dennis case. The value of appellant's remainder interests in both estates and in George's Trust under Agreement when they were established was $ 1,344,728.00, but on his father's death only $ 1,193,564.00 was distributed to appellant by appellee in spite of the fact that the Consumer Price Index went up 312% over this period!!

VI. DELEGATION TO RUML

In the event that this Court does not rule in favor appellant on the basis of appellee's admitted failure to balance the competing interests of the income beneficiaries with those of the remaindermen, appellant respectfully urges that appellee failed to meet its obligation below to extinguish all genuine issue of material fact regarding Mr. Ruml's role in controlling investment decisions in the estates and trusts, for which reason the case should be remanded for trial on this issue.

RELIEF SOUGHT

Appellant respectfully requests this Court to direct entry of Judgment

against appellee in the amount of $3,001,998.50 (plus statutory interest in Connecticut at 10% per annum from October 29, 1984, when appellant's father, Alexander Ewing, died, thus triggering distribution to appellant) which represents the difference between what appellant should have inherited had appellee invested to keep up with inflation, (See number 21, p. 11 hereinabove) and the $1,193,564.00 which appellant actually received from appellee on his father's death, as calculated below.

I. Myra Ewing's Residuary Estate as of January 22, 1967 (A - 238) = $459,260.00
x 3.12 (Consumer Price Index - See p. 11 hereinabove)
= $1,432,891.00 less $472,259.16 actually received by appellant from appellee
= $960,632.00.

II. George Ewing's Residuary Estate as of June 3, 1967 (A - 256) = $283,492.00
x 3.12 = $884,495.00 divided by 2 (appellant only 1/2 remainderman) = $442,247.00 less amount distributed by appellee to appellant of $ 0.00 = $442,247.00.

III. George Ewing's Trust Under Agreement as of May 2, 1967 (A - 268) = $1,487,445.60
x 3.12 = $4,640,830.20 divided by 2 (appellant only 1/2 remainderman) = $2,320,415.10 less amount distributed by appellee to appellant of $721,305.85 = $1,599,109.30.

IV. Total: $960,632.00 plus $442,247.00 plus $1,599,109.00 = $3,001,988.00.

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UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

MICHAEL EWING,

Plaintiff-Appellant,

-against-

CITYTRUST and ALVIN RUML and LYNDA EWING
As Executors of the Estate
of Alexander Ewing,

Defendants-Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

APPELLEE'S AND CROSS-APPELLANT'S BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES .....

INTRODUCTION .....

STATEMENT OF ISSUES .....

STATEMENT OF FACTS .....

ARGUMENT: .....

I. THE STANDARD OF REVIEW AND PROPRIETY OF SUMMARY JUDGMENT.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT CITYTRUST DID NOT ABUSE ITS DISCRETION IN ITS ADMINISTRATION AND INVESTMENT POLICIES.....

III. THE LOWER COURT CORRECTLY HELD THAT CITYTRUST DID NOT DELEGATE INVESTMENT CONTROL...

IV. CITYTRUST DID NOT ABUSE ITS DISCRETION IN THE INVASION OF THE TESTAMENTARY TRUST OF GEORGE EWING.....

CONCLUSION .....

TABLE OF AUTHORITIES

CASE **PAGE**

Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986) .....

Bridgeport-Citytrust Company v. Beach, 119 Conn. 131, 139, 174 Alt. 308 (1934) .....

Carten v. Carten, 153 Conn. 603, 616, 219 A.2d 711 (1966) .....

Celotex Corp. v. Catrett, 106 S. Ct. 2548 (1986) .....

Connecticut Bank & Trust Co. v. Lyman, 148 Conn. 273, 278, 170 A.2d 130 (1961) .....

Cromwell v. Converse, 108 Conn. 412, 425, 143 Atl. 416 (1928) .

Davis v. Hill Engineering, Inc., 549 F.2d 314, 324 (5th Cir. 1977) .....

Dennis v. Rhode Island Hospital Trust National Bank, 571 F. Supp. 623 (D.R.I., 1983) .....

Eaton v. Eaton, 81 N.H. 275, 125 A. 433 .....

Fed. R. App.P.28(a)(4) .....

Gardner v. O'Loughlin, 76 N.H. 481, 84 A. 935 .....

CASE **PAGE**

Gimbel v. Bernard F. and Alva B. Gimbel Foundation, Inc., 166 Conn. 21, 36, 347 A.2d 81 (1974) .....

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Rhode Island Hospital Trust Company v. Egan, 52 R.I. 384, 161 A. 124 .....

Rousseau v. United States Trust Co. of N.Y., 422 F.Supp. 447 (S.D.N.Y., 1976) .....

CASE **PAGE**

Smith v. Sturm, Ruger & Co., Inc., 524 F.2d 776 (9th Cir. 1975) ..

United States Trust Co. v. Bohart, 197 Conn. 34,495 A.2d 1034 (1985) .....

Wards Co., Inc. v. Stamford Ridgeway Associates, 761 F.2d 117 (2nd Cir. 1985) .....

Zeoli v. Commissioner of Social Services, 179 Conn. 83,425 A.2d 553 (1979) .....

STATUTES

Conn. Gen. Stat. §45-100e(37) .....

Conn. Gen. Stat. §45-9 .....

Conn. Gen. Stat. §45-289, §45-291 .

UNITED STATES COURT OF APPEALS

FOR THE

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MICHAEL EWING,

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As Executors of the Estate
of Alexander Ewing,

Defendants-Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

APPELLEE'S AND CROSS-APPELLANT'S BRIEF

INTRODUCTION

This is an appeal and cross-appeal from a judgment based on a Ruling on Cross-Motions For Summary Judgment (A-394) and

on a Ruling on Pending Motions (A-473) in a diversity case decided by the District Court for the District of Connecticut (The Hon. T. F. Gilroy Daly). In its Ruling on Cross-Motions for Summary Judgment, the Court, based upon undisputed material facts, concluded, as a matter of Connecticut law, that the defendant, Citytrust, as trustee, did not abuse its discretion in its administration of certain Estates and Trusts created by George and Myra Ewing. (A-400-410).

The District Court did conclude, however, that Citytrust abused its discretion when it invaded the principal of George Ewing's Testamentary Trust for the benefit of his son, Alexander, despite language in that Trust which authorized the Trustee "to invade the principal for any reason in its discretion. . . ." (A-413). The

invasion involved was in the amount of $111,000 and terminated the George Ewing Testamentary Trust. (A-416). As the grandson, Michael, had a one-half remainder interest in this Trust, damages were awarded in the amount of $55,500 plus prejudgment interest resulting in the judgment in the amount of $81,769.58. (A-479-480). It is from this judgment that Citytrust filed a Cross-Appeal relating solely to the issue of the invasion of principal of the George Ewing Testamentary Trust.

STATEMENT OF ISSUES

1. Did the District court correctly decide, as a matter of Connecticut Law, that Citytrust did not abuse its discretion in the administration and investment policies relating to the George and Myra Ewing Estates and Trusts?

2. Did the District Court err in that portion of its decision which determined that Citytrust had abused its discretion in connection with the invasion of principal terminating the George Ewing Testamentary Trust?

3. Assuming, arguendo, that the Court correctly determined that the invasion of principal was an abuse of discretion, did the Court err in concluding that Michael's claim was not barred by the applicable statute of limitations and/or laches under Connecticut Probate law?

STATEMENT OF FACTS

As the District court noted, the underlying material facts are not in dispute, and the underlying trust documents, of course, speak for themselves. (A-394) Nevertheless, for ease

of reference, the facts are summarized below.

George Ross MacKenzie Ewing and Myra Goldsmith Ewing were husband and wife. Myra Ewing died on May 22, 1964, and George Ewing died on May 3, 1967, leaving an only son, Alexander. Myra Ewing established a Testamentary Trust funded by one-half of her residuary Estate. The income beneficiary was her son, Alexander, and upon his death, the remaining principal went to the lawful issue of Alexander - Michael. Citytrust was co-executor and sole trustee, and had the power "to invest and reinvest without restriction or limitation" or to hold and retain stocks, bonds or other securities "whether or not the same shall be an investment of the character deemed to be legal and proper for Trust Investments

under the laws of the State of Connecticut." (A-205). The trustee was to invest and reinvest the residuary estate and pay over the net income to Alexander for his life. Upon his death, the principal was to go to his lawful issue in equal shares per stirpes. (A-203). In the event that Alexander and Michael predeceased Myra, all the residue was to be paid to Lynda Ewing, Alexander's wife and Michael's stepmother, and upon her death to her children, Michael's stepbrothers and sisters.

The Estate of Myra Ewing had high concentrations of IBM and Singer stock. These securities were sold, and the trust, from its inception was invested in tax-exempt bonds which appreciated in market value from approximately $388,000 to $462,000 as well as providing income for

Alexander. By way of comparison, Singer stock lost substantially all of its value in the mid-1970's, and IBM produced little income. (A-104-105).

Just prior to his death, George Ewing created an inter vivos Trust funded largely with Singer and IBM stock. Citytrust was the Trustee and was authorized to invest and reinvest the funds in the trust and to "pay the income therefrom and so much of the principal as may in the judgment of the Trustee be desirable to or for the benefit of the Grantor's son, Alexander Lunt Ewing, or Grantor's grandson, Michael George Ewing, in such amounts and proportions as my said Corporate Trustee in its sole and absolute discretion shall deem advisable from time to time without regard to equality of distribution." (A-270) Lynda Ewing, and

her children, were also named in the inter vivos Trust. (A-271). The Trustee had the power "to invest and reinvest in any property or security" and "to make, retain or change any investment without liability on account thereof." (A-272).

The inter vivos Trust originally consisted largely of Singer and IBM stock. However, during the course of the administration of the Trust, Citytrust sold these concentrations, and invested in a diversified portfolio mainly in bonds, which preserved the principal and provided a dramatic increase in income. Michael received principal distributions from this Trust in the approximate amount of $40,000 compared to $6,000 of principal distributed to his father, Alexander. (A-102). All requests made by Michael for additional allowance or monies from

Citytrust during his father's lifetime were acceded to and were sufficient to meet his living expenses and other needs. (A-398).

George Ewing also created a Testamentary Trust funded by one-half of the residuary of his Estate, which was in the approximate amount of $283,492. Under the terms of the Will, the Trustee was empowered to pay so much of the net income to Alexander Ewing and the lawful issue of Alexander "in such amount and proportions as my said Corporate Trustee in its sole and absolute discretion shall deem advisable from time to time without regard to equality of distribution. " (A-214). Lynda Ewing and Michael's stepbrothers and sisters were again mentioned in the George Ewing's Testamentary Trust (A-215). The Trustee also had the power to invest and reinvest without restriction or limitation

(A-218). It was also suggested that the Trustee consult with George Ewing's attorneys, Perry & McKendry, "in all matters pertaining to the conduct and settlement of my Estate and the administration of the Trust. . ." (A-220).[1]

---

[1] In this regard, Citytrust received letters from Perry & McKendry in October of 1973, and May of 1980 . Those letters indicate that Citytrust had the broadest possible power and discretion in the invasion of principal and that it was the intent of the Grantor/Testators to favor the son, Alexander, except such amounts as might be necessary to supplement Michael's "obligation to support himself." (A-104). The District Court determined not to rely upon the letters from Perry & McKendry, scrivener of the three Trusts at issue as the District Court was of the view that the language in the Trust documents was unambiguous and unequivocal. (A-402 at footnote 4)

In addition, Michael Ewing received statements relating to the Trusts administered by Citytrust since 1980, if not longer. (A-190). However, he simply threw them in his desk, often unopened, and he never made any inquiry of Citytrust, his father or anybody else regarding statements. (A-106). After the death of his father in October of 1984, Michael received final accounts submitted to the Probate court, however, he never appeared, nor did he make any objection to the Final Accounting submitted. (A-106).

In this suit filed on June 19, 1986, Michael now seeks "to review the investment policies of Citytrust to determine if Citytrust has violated its fiduciary duty" (A-194), and to determine whether Citytrust breached its fiduciary duty when it invaded the remaining

principal in the George Ewing Testamentary Trust for the benefit of Alexander. (A-194). Michael makes the unusual request of an Appellate Court by asking that it take judicial notice of the consumer price index (Brief at p. 10) and enter judgment in the amount of $3,000,000.00.

ARGUMENT:

I. THE STANDARD OF REVIEW AND PROPRIETY OF SUMMARY JUDGMENT.

Upon careful review of the underlying Trust documents, and the undisputed material facts, the District Court determined that Citytrust was entitled to judgment as a matter of law with respect to the claims that it had breached its fiduciary duty in connection with its administration of the Ewing Estates and Trusts. The Court further determined, after a review of the undisputed facts,

that there was no improper delegation by Citytrust of its investment responsibilities to Alvin Ruml. (A-412). The Court did find, however, "that Citytrust abused its discretion in authorizing [the invasion of the George Ewing Testamentary Trust] for the monthly support of Lynda Ewing's children. . ." (A-414) This conclusion was reached because certain interpretations by the Court "cast a substantial shadow of doubt on Citytrust's good faith, or at the least call into question its performance of its duties as Trustee." (A-414).

At the outset, appellate review of the determination of the District Court in a diversity case should be governed by the "clearly erroneous standard." As noted in King v. Horizon Corp., 701 F.2d 1313, 1315 (10th Cir. 1983):

> In addition, since the action was one based on diversity "(d)eference is to be accorded the views of a resident federal district judge with respect to the interpretation and application of the law of his state . . . (and) appellate review is . . . governed by the "clearly erroneous standard." Loveridge v. Dreagoux, 678 F.2d 870, 877 (10th Cir. 1982) Courts of Appeals have generally taken the view that it will not overrule a district judge on questions of state law unless the judge's findings are "clearly wrong." Smith v. Sturm, Ruger & Co., Inc., 524 F.2d 776 (9th Cir. 1975).

In Connecticut, the construction of a will or a trust instrument is a matter of law for the Court to determine from a reading of the instrument as a whole in light of the circumstances surrounding the testator when the instrument was executed. In Connecticut Bank & Trust Co. v. Lyman,

148 Conn. 273, 278, 170 A.2d 130 (1961) the Court wrote:

> . . . We cannot rewrite a Will or a Trust instrument. The express intent must control, although this is to be determined from reading the instrument as a whole in the light of the circumstances surrounding the testator or settlor when the instrument was executed, including the condition of his estate, his relations to his family and beneficiaries, and their situation and condition. 'The construing court will put itself as far as possible in the position of the . . . [settlor], in the effort to construe . . . [any] uncertain language used by him in such a way as shall, conformably to the language, give force and effect to his intention.'

The same type of judicial review is made with respect to other documents in Connecticut, and the meaning and effect

are to be determined by the intent expressed in the language of the document considering all of its relevant provisions and reading it in the light of the surrounding circumstances. In Connecticut, the interpretation of the document presents a question of law. See: Kelly v. Ivler, 187 Conn. 31, 39, 450 A.2d 817 (1982).

The District Court properly applied this analysis in reviewing the provisions of the Trust documents. It also had before it the undisputed underlying facts surrounding the execution and the factual circumstances relating to the parties involved. Rule 56(c) provides that summary judgment shall be rendered if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. As there were no

ambiguities in the language of the Trusts, and no disputed factual issues concerning the investments made or actions taken by the Trustee with respect to the administration of those Trusts, Citytrust was properly entitled to judgment as a matter of law under both federal procedure and Connecticut substantive law. See: Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986); Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986); Knight v. United States Fire Ins. Co., 804 F.2d 9 (2nd cir. 1986); Wards Co., Inc. v. Stamford Ridgeway Associates, 761 F.2d 117 (2nd Cir. 1985).

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT CITYTRUST DID NOT ABUSE ITS DISCRETION IN ITS ADMINISTRATION AND INVESTMENT POLICIES.

The District Court, applying Connecticut law, recognized the long-standing

principle in Connecticut, that where Trustees have discretion, Connecticut courts will not attempt to interfere or control the exercise of that discretion so long as it has not been abused. (A-400-401) Gimbel v. Bernard F. and Alva B. Gimbel Foundation Inc., 166 Conn. 21, 36, 347 A.2d 81 (1974). There is simply no dispute that this is a correct statement of Connecticut law. As noted in Cromwell v. Converse, 108 Conn. 412, 425, 143 Atl. 416 (1928):

> The provisions of the trusts are not obscure. The determination by these trustees of the amount of the income necessary and desirable for the proper maintenance and support of these children is within their absolute discretion. There discretion must stand unless there is a clear abuse of discretion.

In the instant case, and as noted by the District Court, the Trusts under Will and the inter vivos Trust conferred a variety of discretionary powers on both the executors and trustee. In the Testamentary Trust of George Ewing, the trustees had the power to invest and reinvest without restriction or limitation and could invade principal "for any reason." In the Testamentary Trust of Myra Ewing, the Trustee had the power to invest and reinvest without restriction or limitation, and to hold and retain any stocks or bonds whether they were deemed to be legal and proper for trust investments under the laws of the State of Connecticut or not. And finally, in the case of the inter vivos Trust of George Ewing, the Trustee had discretion to invest and reinvest, and to pay income or principal as may "in the judgment of the

Trustee" be desirable either for Alexander or Michael "in its sole and absolute discretion. . . ."

The power to invest and reinvest was clearly within the discretionary powers given to the Trustee. Just as clearly, the actions taken by the Trustee did not constitute an abuse of that discretion under Connecticut law. See: Zeoli v. Commissioner of Social Services, 179 Conn. 83, 425 A.2d 553 (1979). Indeed, had the Trustee failed to embark upon a program of diversification of the Singer and IBM stock, it might well have been criticized for retaining such stocks. See: Mathews v. Sheehan, 76 Conn. 654, 660, 57 Atl. 694 (1904); United States Trust Co. v. Bohart, 197 Conn. 34, 495 A.2d 1034 (1985). As to the discretionary power conferred upon the Trustee to appoint income or principal in

favor of a particular beneficiary, Connecticut recognizes the general rule that a Court will not interpose if the Trustee acts honestly and from proper motives. Bad faith is the primary limitation on a Trustee's authority in such a case. This is set forth in §45-100e(37) of the Connecticut General Statutes which states in pertinent part that a fiduciary will not be held liable so long as it is acting in good faith in the management of the trust property. Liability is imposed only on facts which would suggest bad faith, willful misconduct, or gross negligence.

The Court below, following Connecticut law, noted that a "Trustee has abused his discretion when he has failed to perform his duties or acted dishonestly or in bad faith or acted from improper motive."

(A-407) Citing, Gimbel v. Bernard F. and Alva Gimbel Foundation, Inc., 166 Conn. 21, 347 A.2d 81 (1974). The Court also rejected Michael's argument that he would have received more money had the Trust been managed differently placing greater emphasis on the interest of the remainderman. Again, the Court rejected this argument citing Kimball v. New England Trust Co., 14 Conn. Supp. 432 (1947) and writing:

> In Kimball, the Court refused to upset the Trustee's attempt to diversify the trust holdings to meet the perceived intentions of the settlor in providing for the life tenant and remainderman simply because the remainderman were unhappy about the new investments made by the Trustee. Id. at 441. The Kimball Court made this ruling despite the fact that the Trustee, who was granted a wide berth of discretion, sold blue-chip stocks

> at a low market price. Id. Because a trustee is neither the insurer nor guarantor of the value of trust assets and because a mere error in judgment will not result in liability, Bohart, 197 Conn. at 49, the Court refuses to hold that the Trustee's investment strategy constituted an abuse of discretion.

While Appellant, in his brief, argues that the construction given by the District Court "makes a mockery of the clear intent envisioned by the plain language of his Will and Trust under Agreement," (Brief at p. 39) it is clear that Judge Daly made a careful analysis of the underlying documents in light of the clear principles of probate law in Connecticut. More appropriately, it is Appellant's strained attempt to distinguish the cases cited by the lower court which "makes a mockery" of the applicable principles and the proper

application of those principles to the undisputed facts.[2]

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2 Much of the plaintiff's brief with respect to this appeal is devoted to distinguishing cases cited by the court and reliance on Dennis v. Rhode Island Hospital Trust National Bank, 571 F. Supp. 623 (D.R.I., 1983). In Dennis, there was a clear issue of permitting property to decline while continuing to pay income. This created a partiality problem which could have been avoided had the property been sold and the proceeds reinvested in assets of roughly equivalent total value. The trust was not, as in the instant case, a trust in which the trustee had discretionary powers to allocate income and principal to co-beneficiaries but was rather a clear choice of permitting the corpus of the trust, comprised of real estate, to depreciate, without maintenance, so that income could be distributed. This resulted in the District Court's finding that the trustee, while not necessarily acting imprudently, acted unfairly between income beneficiaries and remainderman. In this case, however, the trustee not only protected the trust corpus but increased income for the benefit of both income beneficiaries, Alexander and Michael. That Alexander may have been distributed more income than Michael is nil sig. That was a discretionary power given to the trustee

(Footnote continued)

III. LOWER COURT CORRECTLY HELD THAT CITYTRUST DID NOT DELEGATE INVESTMENT CONTROL

Part B of the lower court's ruling relates to the claimed delegation of investment control to a friend and advisor of Alexander Ewing, Alvin Ruml. Appellant substantially ignores the Court's ruling in this regard except for a short paragraph at p. 47 of his brief without citation or reference. Under such circumstances, it might well be construed that this argument is being abandoned. Fed. R. App.P.28(a)(4); Harris v. Plastics Mfg. Co., 617 F.2d 438, 440 (5th Cir. 1980); Davis v. Hill Engineering, Inc., 549 F.2d 314, 324 (5th Cir. 1977).

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in its sole discretion, and the discretion exercised was in accordance with the intent of the testator.

The undisputed material facts presented to the lower court with respect to the involvement of Mr. Ruml clearly indicated that Citytrust did not delegate its investment responsibilities to him. As the lower court noted: "It has not been shown in any of these investment decisions that Ruml exercised any kind of ultimate, controlling authority as to which investments were actually made. In fact, the record shows that in those instances where Ruml was consulted, he acted on the investment recommendation made by Citytrust. For these reasons, the Court holds that Citytrust did not delegate its investment authority to Alvin Ruml and did not abuse its discretion in consulting With him in its investment decisions." (A-412)

The undisputed factual evidence submitted to the District Court confirmed that at no time did Citytrust give up its duty to exercise independent judgment in connection with its administration of the trusts or its investment policies. This being the case, the court correctly concluded that Citytrust did not abuse its discretion.

IV. CITYTRUST DID NOT ABUSE ITS DISCRETION IN THE INVASION OF THE TESTAMENTARY TRUST OF GEORGE EWING.

The Court below did hold that Citytrust abused its discretion in invading the remaining principal of $111,000 of the George Ewing Trust thereby terminating the Trust. (A-416). It is on this portion of the Court's ruling that Citytrust bases its Cross-Appeal. At the outset, on the Cross-Motions for Summary Judgment, there

was very little argument or analysis with respect to this issue. Indeed, while paragraphs 14 and 15 of the Complaint (A-11) make reference to the invasion of principal, nowhere in the claims for relief is there any request for damages because of any impropriety for that invasion. Indeed, the only claim in the Complaint concerning wrongful invasion is set forth paragraph 30 of the Complaint which relates to the Myra Ewing Trust. (A-15). This claim has since been abandoned. (A-479).

Pages 23 and 24 of plaintiff's brief before the Court below refer to the invasion of principal issue. (A-136-137). Here, the plaintiff agreed that Citytrust could be held to have abused its discretion only if it were found that Citytrust acted in bad faith. (A-136). The

plaintiff argued that Citytrust did, in fact, act in bad faith arguing 1) that the invasion of principal was made for the benefit of Lynda Ewing's four children, 2) that the authorization for invasion of principal failed to mention that the plaintiff was an income beneficiary and remainderman of the Trust, 3) that the authorization was not co-signed by two trust officers, and 4) that the final accounting of the Trust failed to advise the Probate Court that Michael had an income, and a remainder interest in the Trust. As George Ewing's Testamentary Trust clearly and unequivocally permitted the invasion made, little emphasis was placed on this issue as it was not perceived to be a claim in the Complaint and was admittedly not a primary claim of the plaintiff. (A-133). Accordingly, Citytrust made no particular analysis of

this claim in its briefs except to note the language of the trust which permitted such invasion. (A-392).

It is believed that the District Court improperly concluded "that Citytrust abused its discretion in authorizing this invasion for the monthly support of Lynda Ewing's children. . ." (A414). In the first instance, the invasion was not for Lynda Ewing's children but was for Alexander to use as monthly support for his stepchildren. As noted in the purpose, Alexander was "currently spending about $5,000 monthly to support stepchildren - this invasion will take care of two years expenses." (A-361). Arguably, and apparently as felt by the District Court, the children, who were of adult age, should have been able to provide for themselves. (A-414). However, Alexander had supported his children, including

Michael, long after their majority. For example, Alexander had given Michael considerable funds to build a recording studio, and helped him with rent, and spending money quite apart from any distributions from the Trust. (A-435). As such, it hardly appears to have been in bad faith for Citytrust to have invaded the principal for the distinct purpose and use of Alexander to support his stepchildren.[3]

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[3] It is also clear that Lynda and her children (Michael's stepmother, and stepbrothers and sisters) were not strangers to George and Myra Ewing. Both Lynda and her children were mentioned in their wills and trusts. While this is not unheard of, it is outside the norm. Typically, second wives and stepchildren would not be considered as the natural bounty of the grandparents. Nevertheless, in the Ewing trusts they are expressly named suggesting to the administrative trustee that Alexander's care and support of the these children would be a proper

(Footnote continued)

In an analogous suit, the Court held that the Trustee in exercising its discretion as to payments to be made to the beneficiary should consider the fact that the beneficiary is living and supporting his wife. Bridgeport-Citytrust Company v. Beach, 119 Conn. 131, 139, 174 Alt. 308 (1934). Here the Court concluded:

> The needs of a married man pertaining to support and maintenance may fairly be construed as including those of his family. In the absence of indication to the

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reason for invasion especially in light of the power "to invade for any reason." By analogy, had Alexander wanted a new car and the trustee had invaded for that purpose, it is doubtful that the District Court would have found an abuse of discretion. Here the invasion was for Alexander to support individuals actually named and considered by the testators themselves. A fortiori, there was no bad faith or abuse of discretion.

> contrary, it is hardly to be deemed probable that a testator who provides for the support of a son intends at the same time to let his wife or children suffer for the necessities of life. Eaton v. Eaton, 81 N.H. 275, 125 A. 433, Rhode Island Hospital Trust Company v. Egan, 52 R.I. 384, 161 A. 124; Gardner v. O'Loughlin, 76 N.H. 481, 84 A. 935. The trustee should consider the fact that Beach [the Testator's son] is living with and supporting a wife.

The instant case would appear no different. Citytrust knew that Alexander was supporting himself, his wife, his son Michael, and his wife's children. Accordingly, to invade principal for that purpose when the Trustee is authorized "to invade the principal for any reason in its discretion for the benefit of my said son" hardly rises to an act of bad faith, willful misconduct, gross negligence, or

an abuse of discretion given to the Trustee.

The Court also relied, for its conclusion, on its interpretation of various facts. It found that the investment policy guidelines required two signatures which were not present, that the authorization form failed to indicate that the plaintiff was an income beneficiary, and that the caption used on the Final Accounting stated that the Trust was "FOR THE BENEFIT OF ALEXANDER EWING." (A-415).

In its Motion for Reconsideration, Citytrust presented an affidavit indicating 1) that the caption "FOR THE BENEFIT OF ALEXANDER EWING" was one dictated by the Probate Court in its original appointment, 2) that the Probate Court was very much aware of Michael's

interest in the Trust, and 3) that the policy guidelines do not require two signatures but merely approval which was, in fact, obtained from the Trust Administrative Committee. Finally, notice concerning the invasion of principal of the George Ewing Testamentary Trust was, in fact, given to Michael Ewing by copy of a letter dated April 18, 1984. (A-440).

Accounts duly accepted and allowed by the Probate court in Connecticut, without any appeal, are final and binding. Carten v. Carten, 153 Conn. 603, 616, 219 A.2d 711 (1966). Conn. Gen. Stat. §45-9. Likewise, a Federal Court can grant relief only when similar relief would be available in the State Courts of the District. Probate decrees ordering and accepting distribution are final if original jurisdiction to administer the

estates existed. Palmer v. Palmer, 31 F.Supp. 861 (D.Conn., 1940); Rousseau v. United States Trust Co. of N.Y., 422 F. Supp. 447 (S.D.N.Y., 1976).

In its Ruling on Pending Motions, the Court largely dismissed the arguments of Citytrust on the grounds that the underlying facts were not previously submitted, and as such, the Motion for Reconsideration should be denied. (A-474). On the other hand, it is clear from the face of the authorization for the invasion of principal that it was for the benefit of Alexander which was incorrectly construed by the court as being for the benefit of Lynda Ewing's children. In addition, on the question of notice, the Court concedes that the original statement of undisputed facts contains the following: "After the death of his father

in 1984, Michael received final accounts submitted to the Probate Court. However, he never appeared, nor did he make any objection to the Final Accounting submitted. (Trans. 140)." (A-106) (A-475 at footnote 3).

Clearly, it was claimed, and indeed conceded that Michael had notice of the Final Accounting. The only evidentiary item submitted to the Court subsequent to its primary ruling was the mechanism of that notice, i.e., the letter of April 18, 1984. (A-440). Under Connecticut law, the failure of Michael to appeal within twelve months from the Probate Court's approval of the Final Trust Accounting bars the claim insofar as it relates to the invasion of principal of the George Ewing Testamentary Trust. See: Conn. Gen. Stat. §45-289, §45-291.

There is no question but that had Citytrust known that the invasion of principal issue was to be paramount, it could have focused more sharply on this issue to assist the Court in its analysis. Its failure to do so, however, was largely due to the fact that it was not a claim made in the Complaint nor emphasized in any of the underlying arguments.

Even on the facts presented, it is difficult to understand how a distribution to Alexander to be used for the benefit of his family could be considered an act of bad faith or an abuse of discretion on the part of Citytrust. Indeed, under Connecticut law and the authority of Bridgeport-Citytrust Company v. Beach, supra, it is clear that the invasion of principal for Alexander for the support of his wife and children was entirely proper.

CONCLUSION:

For the foregoing reasons, it is respectfully requested that Parts A and B of the lower Court's Ruling on Cross-Motion for summary Judgment be affirmed- It is further requested that Part C relating to the invasion of George Ewing's Testamentary Trust be reversed and remanded with instructions to enter judgment in favor of Citytrust or, in the alternative, that a hearing be held on the underlying factual issues on the question of whether Citytrust abused its discretion by its invasion of the George Ewing Testamentary Trust.

THE APPELLEE/CROSS-APPELLANT,
CITYTRUST

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United States Court of Appeals
for the
Second Circuit

MICHEAL EWING,

Plaintiff-Appellant-
Cross-Appellee

-against-

CITYTRUST and ALVIN RUML and
LYNDA EWING
As Executors of the Estate of
Alexander Ewing,

Defendants-Respodents-
Cross Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

APPELLANT-CROSS-APPELLEE'S REPLY BRIEF

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I. OVERVIEW

Appellee (cross-appellant) does not deny that well established Connecticut law requires a fiduciary (executor and/or trustee), to make investment decisions for an estate or trust which balance the competing interests of the income beneficiaries in maximizing income against those of the remaindermen in preserving the buying power of the corpus. We are here, before this Court today, precisely because appellee did not follow Connecticut law in this regard. Appellee has, throughout this proceeding, always admitted that it made investment decisions for both estates and all three trusts to maximize income without any regard to

the remainder interests therein of appellant (cross-appellee), arguing variously that it was required by law to do so, that it had been given discretion in the instruments here at issue to do so, and that it did so to avoid having had to make larger and more frequent invasions of principal (corpus).

The primary reason for this appeal is appellant's contention that the Court below was clearly erroneous as a matter of law when it held, in Part "A" of its ruling (A400-410), that the instruments here at issue gave appellee discretion to make investment decisions which favored production of income over preservation of the buying power of the corpus, and that such discretion had not been abused by appellee, except in

one instance (the subject of appellee's cross-appeal). Both parties agree with the Court below that the language of the instruments here at issue is clear and unambiguous. Appellant, however, argued strongly in its Main Brief that there was no language in the instruments, which gave, or could even be construed as giving, such discretion to Appellee. Appellant also argued, in its Main Brief, that even if this Court should agree with the Court below that appellee had been given such discretion in all of instruments here at issue, this Court should reverse the lower Court's determination that such discretion had not been abused by appellee. Finally, appellant emphasized that the Court below had failed to explain how it inferred that

appellee had been given such discretion in Myra Ewing's Will, whose Testamentary Trust gave appellee no discretion to invade principal (in contrast to the giving of such discretion in George Ewing's Will and in his Intervivos Trust).

This Court will note that appellee, in its Brief for this Court, chose not to respond directly to any of the arguments made in appellant's Main Brief and, instead, chose to rely upon name-calling, stating that appellant's analysis of the reasons why this Court should reverse the Court below makes a mockery of applicable Connecticut law. This Court will also note that appellee never even attempts to explain <u>why</u> or <u>how</u> the appellant's analysis is flawed.

If this Court sustains Part A of the Ruling of the Court below (A400-410) which was made in favor of appellee, it will be totally reversing long-standing Connecticut law on the duty of a fiduciary to balance the competing interests of successive beneficiaries. Appellant respectfully contends that such a major change in the substantive law should be made only by the legislative branch of the government, not by the judiciary.

If this Court sustains Part A of the Ruling of the Court below (A400-410), it will be effectively amending, in an ex post facto manner, all will and trust instruments in Connecticut that contain language giving the fiduciary discretion to invade principal or "to invest and

reinvest without limitation" by holding that such language is evidence that the testator and/or settlor intended to give the executor and/or trustee authority to discriminate between successive beneficiaries in making investment decisions for such estates and trusts.

Appellant also argued in its main brief that, even if appellee had discretion to favor the income beneficiaries over the remaindermen, it should be held to have abused this discretion. Appellee chose not to attempt rebuttal of these arguments, and instead contended, in effect, that its discretion was so broad that it could not have been abused. Since Connecticut law clearly holds that no grant of discretion is absolute and

unconditional, if this Court sustains Part A of the Ruling below, it will be reversing long-standing Connecticut law in this regard. Such a ruling would mean that fiduciaries in Connecticut are beyond the reach of Court review in their conduct in handling estate and trust assets.

II. THE FACTS

Appellee has never taken the trouble to really familiarize itself with the facts of the case. In contrast, all facts cited by the appellant are fully documented in the record of this case. Appellee refers to the date of death of Myra Ewing as May 22, 1964 (which is the date of her Will), when she actually died on

January 22, 1967 (A - 196). Likewise, appellee refers to the date of death of George Ewing as May 3, 1967 (the date on which his Will was executed) when he actually died on June 3, 1967 (A - 198).

Appellee also frequently refers to facts which are totally irrelevant to the instant proceeding. One example, which might be funny if the bank's misconduct were not so serious, is the reference (on page 3 of Appellee's main brief) to the language in all three instruments authorizing the appellee to hold and retain any securities with which either George or Myra Ewing died seized (or in the case of George's Intervivos Trust, the shares of IBM and Singer with which it was established). As pointed out in appellant's main

brief, p. 42-43, appellee sold all assets of the estates within two months after the death in each case, and appellee admits to converting George's Intervivos Trust to a portfolio consisting solely of municipal bonds.

Another example of the conduct of appellee in this regard is its attempt to characterize its investment decisions as prudent diversification. (Appellee's main brief, pp. 4-5). There is some humor here also. The relief requested by appellant is no more than what he should have inherited if appellee had, in fact, invested in a prudently diversified portfolio, balanced in assets which, on the one hand, yielded reasonable income for the income beneficiaries yet, on the other hand, achieved sufficient growth to

preserve the buying power of the corpus in spite of inflation.

Perhaps the most galling example of appellee's continued reference to irrelevant facts is its claim that "[a]ll requests made by Michael for additional allowance or monies from Citytrust during his father's life were acceded to and were sufficient to meet his living expenses and other needs." (Appellee's main brief, p. 5). The fact is that appellee never advised appellant of his rights in and to the estates here at issue, never sought to ascertain his needs, and began to give him a regular monthly stipend only when, in 1979, he confronted appellee and demanded it. In fact, appellee does not deny that almost all money given to appellant during the seventeen

year administration (1967-1984) of the estates and trusts here at issue was taken from principal so that appellee could continue to give all income from both estates and all three trusts to appellant's father. The issues of income distribution between appellant and his father and invasions of principal during his father's life (except for the one invasion which appellant contended, and the Court below held, was an abuse of discretion) are legally irrelevant because appellant chose not to assert any claim he might have had against appellee on either of these issues. Appellee cites these issues only because it wishes to drive home the also irrelevant and intentionally prejudicial point that appellant, having inherited over one

million dollars, should not now complain that he was entitled to more.

Finally, appellee again tries to distract this Court by reference to appellant's failure (after appellee first began sending him accounting statements for the trusts in 1980) to make any inquiry of appellee as a result thereof. As argued by appellant in its Brief for the Court below (A 145-152) and determined by the Court below in its Ruling (at A - 416), appellant had, under Connecticut law, no affirmative duty to investigate appellee's conduct as a fiduciary. Appellee's reference to appellant's conduct of ignoring these accounting statements is no more than another blatant attempt to prejudice this Court against appellant's position.

III. INTENT OF MYRA AND GEORGE EWING

The parties agree that a testator or settlor can advise his executor or his trustee not to follow the normal rule of Connecticut law mandating evenhanded treatment of successive beneficiaries. However, if this Court sustains the decision of the Court below, it will be totally defeating the clear intent of Myra Ewing and George Ewing plainly expressed in their Wills and in George's Intervivos Trust, because there is simply no language in any of the instruments which would permit appellee to ignore this well established precept of Connecticut law. The Court below implied such an intent from language in the

instruments, which construction appellant strongly argued, in its main brief, was clearly erroneous as a matter of law. Intent should not be determined by implication unless ambiguity in the instrument leaves the construing court no choice. Both parties agree that the instruments here at issue are clear and unambiguous.

Appellee chose, in its Brief for this Court, to limit its discussion of the intent of Myra Ewing and George Ewing to again offering into evidence the recollection of the scrivener of all three instruments here at issue that Myra and George Ewing intended appellee to administer the assets of their estates and trust to favor maximizing income for the benefit of appellant's father over all other

considerations. Having never contended that that there is any ambiguity in any of the three instruments here at issue, appellee never addresses the issue of the relevance or the admissability, under Connecticut law, of the scriveners recollection of the intent of a testator and/or settlor.

Appellant respectfully directs this Court's attention to the case of Connecticut Junior Republic, et al., v. Sharon Hospital, et al., 188 Conn. 1, 448 A.2d 190 (1982) where the Connecticut Supreme Court held:

> "Connecticut law does not allow extrinsic evidence of a testator's intent to be admitted in cases dealing with either will construction or cases challenging the probate of an instrument. While there is an exception to this rule when there is ambiguity on the face of the will or codicil itself, this exception is not applicable in the instant

> case....the intent of the testator as expressed in the language he used is clear. The question is not what he meant to say, but what is meant by what he did say."

id. at 448 A.2d 194 and 199 (emphasis added).

Appellee points to language in Myra's Will and in George's Will (which language is not in George's Intervivos Trust) suggesting that appellee should consult with the scrivener of the Wills (Perry & McKendry) for advice in the administration of the said estates and trusts. Now, if the language in the instruments referring to appellee's consulting with Perry & McKendry had instead attempted to give Perry & McKendry the power to determine application of principal and income

between designated beneficiaries, appellee might be entitled to some consideration in its alleged reliance upon their opinion to sustain appellee's investment decisions made for the estates and trusts, even though such language would present a very novel legal question as to the legality of an attempt by a testator or settlor to delegate dispositive power to a party who has no fiduciary obligations toward the beneficiaries. However, as this Court can see, the language in question only suggests that appellee consult with Perry & McKendry on questions relating to the administration of the estates and trusts. As pointed out in appellant's main brief, and not refuted by appellee, Connecticut law does not

permit even the broadest delegation of administrative authority to a fiduciary to alter the dispositive scheme of a will or trust.

Appellant contends that the opinion of Perry & McKendry as to the intent of Myra and George Ewing contradicts the plain language of their respective wills. What it comes down to is that Myra and George Ewing could have authorized appellee to act as it did, but they did not do so.

IV. DISCRETION

Appellant has always recognized that appellee was given discretion by George Ewing (but not by Myra Ewing) to invade the principal of his estate, his testamentary trust, or his intervivos

trust, for the benefit of appellant or his father. Accordingly, appellant challenged only one invasion of principal (See Daly Ruling, Part C, A 413-416) on the basis that the act constituted an abuse of discretion. Appellant wishes to re-emphasize the argument made in its main brief that the misconduct here complained of - appellee's admitted practice of making investment decisions in both estates and all three trusts to maximize income without regard to the competing interest of the remaindermen in preservation of the buying power of the corpus - does not fall within the ambit of the discretion which was admittedly granted to appellee by the instruments. This Court will note that appellee, in its brief for this Court, ignored this argument.

Appellee instead chose to try to distract this Court in several ways. First, it argues that a court will not control an exercise of discretion unless it is abused, which appellant admits is the law in Connecticut. However, this argument begs the point of whether the instruments here at issue granted appellee discretion to favor one class of beneficiary over another. Moreover, no discretion, however broad, is absolute:

> "Although the use of the term "sole discretion" confers a wide discretion, no language in a trust will be so construed as to remove a trustee from equitable control. "To the extent to which the trustees had discretion, the court will not attempt to control their exercise of it as long as they have not abused it.... But the law will not tolerate its abuse, however great the

> creator of the trust intended the grant of discretion to be." Conway v. Emeny, supra. This rule applies even when the will has used the term "absolute" or "sole" discretion. Ibid. The same rule is recognized in Connecticut Bank & Trust Co. v. Lyman, 148 Conn. 273, 281, 170 A.2d 130."

Connor v. Hart, 157 Conn. 265, 274, 253 A.2d 9 (1968).

Appellant argued, in its main brief that, even if the conduct herein at issue was within the discretion granted to appellee by the instruments, appellee must be found to have abused such discretion. This Court will note that appellee has not attempted to refute any of appellant's allegations of abuse of discretion.

Appellee next emphasizes its admitted discretion to invade principal, without ever explaining what relevance this has to the issue of the

investment policy pursued by appellee in both estates and all three trusts of maximizing income for the benefit of Alexander without giving any regard to the competing interests of the remaindermen in the preservation of the buying power of the corpus. Instead, appellee merely renews its argument that its conduct is not an abuse of discretion, citing Zeoli v. Commissioner of Social Services, 179 Conn. 83, 425 A.2d 553 (1979). Even ignoring the fact that the Zeoli case involves a spendthrift trust, while the instant case does not, the holding of the Zeoli court supports only the position of appellant:

> "The well-settled rule in this state is that the exercise of discretion by the trustee of

> a spendthrift trust is subject to the court's control only to the extent that an abuse has occurred under the powers granted by the testamentary disposition."

id, at 425 A.2d 556 (emphasis added).

Appellee also finds comfort in the provision of §45-100(e)(37) of the Connecticut General Statutes, even though the cited statute, as appellant advised the Court below (A 140-141), does not apply because it was adopted in 1969 and, by its own language, does not apply to instruments, like those here at issue, which were executed prior to January 1, 1970. Even if such law were applicable herein, appellant respectfully contends that such statute was never intended to insulate a fiduciary from liability for exercising discretion not given to the fiduciary

in the instrument and, by its own language, does not cover abuse of discretion.

V. DELEGATION TO RUML

The Court below found that:

> "Citytrust's investment reviews for the period of 1967 to 1984 indicate that Ruml also acted as an investment adviser and broker on all three of the Ewing trusts. They indicate that the buy and sell orders flowing from Citytrust's investment decisions were processed through the brokerage firm where Mr. Ruml worked, namely First Manhattan Corporation. In this context, it is clear that Ruml: 1) commented on and approved investment recommendations made by Citytrust both in the role of investment adviser and as the "representative" of Alexander Ewing; 2) communicated to Citytrust regarding Alexander's income needs; 3) offered unsolicited investment advice; and 4) generally acted as an all-purpose investment broker."

(Daly Ruling, p. 19, A - 412).

The Court below then nevertheless concluded:

> "This course of dealings does not indicate that Citytrust delegated its investment responsibilities to Ruml, as did Alexander Ewing."

(Daly Ruling, p. 19, A - 412).

Appellant has not abandoned its claim on this this issue. As stated in its main brief, appellant does not believe that appellee met with requirement for summary judgment on this issue because the evidence before the Court does not extinguish all doubt as to the extent of Ruml's control over appellee's investment decision process. Moreover, the Court below fails to understand that part of appellant's claim in this regard is

that appellee breached its fiduciary duty to appellant by acquiescing in Alexander's delegation of his fiduciary duties to Mr. Ruml.

VI. INVASION OF GEORGE EWING'S TESTAMENTARY TRUST

Appellee commences argument on its cross-appeal by noting that this issue was given little attention by the parties in their cross-motions for summary judgment before the Court below. This Court can see that such is not the case. Appellant set forth in detail in its Brief for the Court below (at A 136-137) why it felt appellee's conduct in this regard was an abuse of its discretion. While appellee, in its Reply Brief for the Court below (at A

384-394), chose not to address this claim at all, the Court below had no difficulty in ascertaining that appellee's conduct in this regard constituted an abuse of the discretion all parties admit appellee was given in this particular instrument to invade principal.

Appellee only now objects to this part of appellant's claim against it for the reason that such claim was not made with specificity in the Complaint herein. The reason why this conduct of appellee was not enumerated as a separate cause of action in the Complaint is simply that appellant became aware of the facts leading to the conclusion that appellee had abused its discretion in this particular regard only during the course of

discovery, after commencing the instant action.

While appellant acknowledges that it might have been desirable to amend the Complaint to specifically allege this particular misconduct of appellee, it is clear that this Court should not reverse the Court below solely because appellant failed to move to amend the Complaint:

> "Amendments to conform to the evidence are desirable because they bring the pleadings in line with the issues that actually were developed at trial; this is permitted even though the material inserted by amendment was not presented by the pleadings as originally drawn. But Rule 15(b) does not require that a conforming amendment be made and there is no penalty for failing to do so."

Wright, Miller & Kane, Federal Practice and Procedure, (2nd Ed., 1983) § 1493, p. 460-461.

Also, this Court will note that appellee failed to make objection to the Court below that appellant's argument concerning the invasion of George Ewing's Testamentary Trust was not properly pleaded in the Complaint. Thus, appellee, in effect, consented to the adjudication of this issue by the Court below and should not now be permitted to complain thereof:

> "A party who knowingly acquiesces in the introduction of evidence relating to issues that are beyond the pleadings is in no position to contest a motion to conform."

id., at § 1493, p. 462-463.

In attempting to address the substance of this issue, appellee argues that: "...the invasion was not for Lynda Ewing's children but was for Alexander to use as monthly support for his stepchildren." (appellee's brief, p. 19) Appellant contends that the Court below properly held that such a broad interpretation of the discretion granted to appellee in the instrument would effectively eliminate the restriction set forth in the instrument that any such invasion of principal be solely for the benefit only of appellant or his father. As appellee has noted in its Brief for this Court, Myra and George Ewing made other provisions in their Wills and in George's Intervivos Trust to provide

for Lynda Ewing and her four children. Appellant contends that appellee's conduct in this regard is nothing more than a blatant attempt to short-circuit the testamentary scheme set up by George Ewing in his Will so that Lynda and her children would not have to share the assets in George Ewing's Testamentary Trust with appellant on the death of his father, as George Ewing had clearly mandated.

Appellee also suggests that this attempt to provide for appellant's stepbrothers and stepsister is no different that the assistance appellant's father gave to appellant. This ignores the vital distinction between appellant and his stepbrothers and stepsister. George Ewing, in both of his trusts, made appellant a

co-income beneficiary with appellant's father, while appellant's stepbrothers and stepsister were solely remaindermen in both. Thus, for Alexander to act as a conduit to pass funds to appellant (and the record clearly shows that appellee gave Alexander monies from the trusts intended for appellant - see A - 275) in no way violates the dispositive provisions set forth in either of George Ewing's Trusts, while having Alexander act as a conduit to pass funds to appellant's stepbrothers and stepsister does violate these dispositive provisions. Appellee's argument that since Lynda Ewing's four children are remaindermen in the trusts, providing for them cannot be considered bad faith totally ignores the plain dispositive language of the instruments here at issue.

Appellee also refers to the case of Bridgeport - Citytrust Company v. Beach, 1919 Conn. 131, 174 A. 308 (1934) for the proposition that a trustee can consider the needs of a beneficiary as a married man to support his family. While this case might have some relevance if the invasion in question had been made to enable appellant's father to support his wife, no reading of the cited case will support an invasion made solely to benefit appellant's stepbrothers and stepsister, all of whom were emancipated adults (i.e., not living in the home of appellant's father) at the time of the invasion and none of whom had been legally adopted by appellant's father. This Court will also note that appellee has never even alleged any

facts to show that appellant's father could not, without such invasion, give whatever assistance he wanted to his stepchildren (remembering that appellant's father became a very wealthy man upon the deaths of appellant's grandparents in 1967). The failure to allege such facts is another indicator of appellee's bad faith in this particular transaction.

Appellee next rehashes the same arguments it made to the Court below in its Motion for Reconsideration (A 419 - 440) without ever addressing any of the points made by appellant in its Memorandum of Law for the Court below opposing the Motion for Reconsideration (A 441 - 459). The only real substance in any of appellee's arguments on this matter concern appellant's alleged

receipt of a carbon copy of a letter sent by appellee to appellant's father. While holding that the proffered evidence was not properly admitted (i.e., at the time of appellee's motion for summary judgment), the Court below nevertheless found the proffered evidence unpersuasive:

> "Whether the alleged receipt of a carbon copy of a letter (dated April 18, 1984) addressed to his father referring to the final accounting (not containing the accounting itself) of the trust at issue was sufficient to put plaintiff on notice that his rights in that trust would be extinguished is doubtful. Also, the relevance of this alleged notice to those misdeeds constituting the defendant's breach of a fiduciary duty is questionable."

Daly Ruling, p. 2-3, A 474-5.

Finally, appellee again contends that appellant's claim in this regard should be time-barred, since the Final Account for George Ewing's Testamentary Trust was allowed by the Probate Court more than twelve months prior to the commencement of the instant action. As noted by the Court below, appellee's argument in this regard is not timely made, since it was not argued by appellee in either its Memorandum of Law for the Court below in support of its summary judgment motion or in its Reply Memorandum for the Court below.

Appellant contends that, even if this argument had been properly made by appellee in the course of its motion for summary judgment, appellant's claim in this regard would, nevertheless, not

have been time-barred for the reasons set forth both in appellant's Memorandum of Law for the Court below in support of its cross-motion for summary judgment at A - 153 to A - 156 and, again in its Memorandum of Law for the Court below in opposition to appellee's Motion for Reconsideration at A - 454 to A - 457.

To support its position in this regard, appellee cites the case of Carten v. Carten, 153 Conn. 603, 219 A.2d 711 (1966). To begin with, the Court in that case held that:

> "Since the accounts of the trustees covering the operation of the trust from its creation until April 30, 1957, had, after notice to the beneficiaries, including the plaintiffs, been duly accepted and allowed by the Probate Court without any appeal having been taken, the decrees

> approving those accounts were conclusive as to all relevant matters embraced therein."

id., 219 A.2d at 718 (emphasis added). The Carten case makes no change in long-standing Connecticut law that, in the absence of the notice from the Probate Court specified in the statutes and probate court rules previously cited by appellant to the Court below, a beneficiary is not barred from seeking to surcharge a trustee for breach of fiduciary duty:

> "...it is pertinent to note that the allowance by a probate court of the account of a testamentary trustee does not constitute an adjudication of any matter not apparent on the fact of the account nor bar a beneficiary from a subsequent action in the Superior Court to recover damages for a breach of trust by a trustee. Phillips v. Moeller, supra, 147 Conn. 489, 163 A.2d 95; Dettenborn v. Hartford-National Bank & Trust Co., supra, 121 Conn. 393, 185 A. 82; 1 Locke & Kohn, Conn.

> Probate Practice §§ 151-54; 2 id. § 561."

id., 219 A.2d at 717.

Likewise, neither of the other cases cited by appellee, Palmer v. Palmer, 31 F. Suppl. 861 (D. Conn., 1940) and Rousseau v. United States Trust Co. of N.Y., 422 F. Supp. 447 (S.D.N.Y., 1976), in any way support a conclusion that the twelve month statute of limitation applies in the absence of the notice mandated by Connecticut statute and the Connecticut Probate Court rules.

Finally, as appellant brought to the attention of the Court below, appellee's failure to give the Probate Court the opportunity to give appellant official notice of submission of the Final Account falls within the ambit of Conn. Gen. Stat., Section 52-595 which states:

> "If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence."

VII. RELIEF SOUGHT

Appellee contends that appellant has made an "unusual request" (appellee's Brief, p. 7) of this Court, first, in asking it to take judicial notice of the consumer price index, and, secondly, in asking it to enter judgment for appellant instead of remanding for a determination of damages. Appellant contends that both of its requests are fully supported at law. As pointed out in a leading treatise:

> "Judicial notice of census reports and the information contained in them is quite common [citations omitted], as is judicial notice of mortality tables [citations omitted], and other statistical information (Federal District Court could take judicial notice of publications of the Bureau of Labor Statistics of the United States Department of Labor. Pierce v. New York Central Railroad Co., 304 F. Supp. 44 (D.C. Mich., 1969)."

Wright, Miller & Kane, id., § 2410, p. 348 - 351.

The consumer price index is published by the Bureau of Labor Statistics. Appellee does not dispute that this index rose by 312% from 1967 through 1984. This Court can take judicial notice thereof.

It is equally obvious that this Court has authority to direct entry of judgment instead of remanding for a determination of damages:

> "Analogously, when the standard of Rule 56(c) has been met, the reviewing court may direct the entry of summary judgment even though the district court did not act favorably on the motion. The appellate court either can include the order as part of its opinion or remand the case with directions to enter a summary judgment."

Wright, Miller & Kane, id. at § 2716, p. 660.

Appellee, finally, expends much effort in distinguishing the facts before the Court in Dennis v. Rhode Island Hospital Trust National Bank, 571 F. Supp. 623 (D.C. R.I., 1983), aff'd on appeal 744 F.2d 893 (1984), from those before this Court. Appellant cites the Dennis case only as precedent on the issue of determining the amount of his damages, not relying at all on the Dennis case to support

his contention that appellee's conduct violates applicable Connecticut law. Not only is Rhode Island law irrelevant to appellee's fiduciary duties under Connecticut law, but the trust instrument before the Dennis Court also differs materially from those before this Court in this case.

Appellee never cites any authority to show why the measure of damages (the consumer price index) used by the Dennis Court should not also be used herein by this Court. In fact, appellee ignores the fact that the measure of damages used by the District Court in the Dennis case was explicitly upheld by the First Circuit on appeal. Accordingly, appellant respectfully renews its request that this Court direct entry of judgment for appellant

in the amount of $3,001,988.00 plus Connecticut statutory interest (10% per annum) from the date of the death of Alexander Ewing on October 29, 1984, to the present date.

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